No. 16-9493	
Title:	**Florencio Rosales-Mireles, Petitioner** **v.** **United States**
Docketed:	June 9, 2017
Lower Ct:	United States Court of Appeals for the Fifth Circuit
Case Numbers:	(16-50151)
Decision Date:	March 6, 2017
Questions Presented	

DATE	PROCEEDINGS AND ORDERS
Jun 05 2017	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due July 10, 2017)
Jul 07 2017	Order extending time to file response to petition to and including August 9, 2017.
Aug 09 2017	Brief of respondent United States in opposition filed.
Aug 22 2017	Reply of petitioner Florencio Rosales-Mireles filed. (Distributed)
Aug 24 2017	DISTRIBUTED for Conference of 9/25/2017.
Sep 28 2017	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED.
Nov 09 2017	The time to file the joint appendix and petitioner's brief on the merits is extended to and including November 29, 2017.
Nov 09 2017	The time to file respondent's brief on the merits is extended to and including January 10, 2018.
Nov 29 2017	Joint appendix filed. (Statement of cost filed.) **Main Document** **Proof of Service**
Nov 29 2017	Brief of petitioner Rosales-Mireles, Florencio filed. **Main Document** **Proof of Service** **Certificate of Word Count**

Dec 05 2017	Brief amici curiae of National Association of Criminal Defense Lawyers, et al. filed. **Main Document** **Proof of Service** **Certificate of Word Count**
Dec 20 2017	SET FOR ARGUMENT ON Wednesday, February 21, 2018
Jan 05 2018	CIRCULATED
Jan 10 2018	Record requested from the U.S.C.A. 5th Circuit.
Jan 10 2018	Brief of respondent United States filed. (Distributed) **Proof of Service** **Main Document**
Feb 09 2018	Reply of petitioner Rosales-Mireles, Florencio filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Feb 21 2018	Argued. For petitioner: Kristin L. Davidson, Assistant Federal Public Defender for Western Dist. of Tex., San Antonio, Tex. For respondent: Jonathan Ellis, Assistant to the Solicitor General, Department of Justice, Washington, D. C.

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No. 16-9493

In the Supreme Court of the United States

October Term, 2016

FLORENCIO ROSALES-MIRELES, *PETITIONER*,

v.

UNITED STATES OF AMERICA

ORIGINAL

PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS OF THE FIFTH CIRCUIT

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

FILED
JUN 05 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Petitioner Florencio Rosales-Mireles, by and through his undersigned attorney, and pursuant to Rule 39.1, Supreme Court Rules, and Title 18, United States Code, § 3006A(d)(7), respectfully moves this Honorable Court for leave to proceed *in forma pauperis*, and for leave to file the attached Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit without prepayment of fees. Petitioner was represented by appointed counsel under the Criminal Justice Act of 1964, as amended, in the district court and the court of appeals. Leave to proceed *in forma pauperis* was never sought in any other court.

Respectfully submitted.

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16-9493

In the Supreme Court of the United States

October Term, 2016

FLORENCIO ROSALES-MIRELES, *PETITIONER*,

v.

UNITED STATES OF AMERICA

ORIGINAL

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS OF THE FIFTH CIRCUIT

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10

QUESTION PRESENTED FOR REVIEW

In *United States v. Olano*, this Court held that, under the fourth prong of plain error review, "[t]he Court of Appeals should correct a plain forfeited error affecting substantial rights if the error 'seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." 507 U.S. 725, 736 (1993). To meet that standard, is it necessary, as the Fifth Circuit Court of Appeals required, that the error be one that "would shock the conscience of the common man, serve as a powerful indictment against our system of justice, or seriously call into question the competence or integrity of the district judge?"

No. _____

In the Supreme Court of the United States

October Term, 2016

FLORENCIO ROSALES-MIRELES, Petitioner,

v.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS OF THE FIFTH CIRCUIT

Petitioner Florencio Rosales-Mireles respectfully prays that a writ of certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Fifth Circuit on March 6, 2017.

PARTIES TO THE PROCEEDING

The caption of this case names all parties to the proceeding in the court whose judgment is sought to be reviewed.

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES iv

OPINION BELOW 1

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES 1

FEDERAL RULE OF CRIMINAL PROCEDURE INVOLVED 1

STATEMENT 1

REASONS FOR GRANTING THE WRIT 6

CONCLUSION 12

APPENDIX *United States v. Rosales-Mireles*, 850 F.3d 246 (5th Cir. 2017)

TABLE OF AUTHORITIES

Cases

County of Sacramento v. Lewis,
523 U.S. 833 (1998) 8

Henderson v. United States,
113 S. Ct. 1121 (2013) 8, 9

United States v. Atkinson,
297 U.S. 157 (1936) 6, 7, 8

United States v. Dahl,
833 F.3d 345 (3d Cir. 2016) 9

United States v. De Santiago-Guillen,
653 F. App'x 303 (5th Cir. 2016),
on remand from 136 S. Ct. 1711(2016) 11

United States v. Escalante-Reyes,
689 F.3d 415 (5th Cir. 2012) (en banc) 4, 7

United States v. Frady,
456 U.S. 152 (1982) 8

United States v. Garrett,
528 F.3d 525 (7th Cir. 2008) 9

United States v. Handy,
647 F. App'x. 296 (5th Cir. 2016) 10

United States v. Hernandez,
690 F.3d 613 (5th Cir. 2012) 7

United States v. Mendoza-Velasquez,
No. 16-40194, 847 F.3d 209 (5th Cir. 2017) (per curiam) 10

United States v. Molina-Martinez,
136 S. Ct. 1338 (2016) 9

United States v. Molina-Martinez,
824 F.3d 548 (5th Cir. 2016),
on remand from 136 S. Ct. 1338 (2016) 11

United States v. Olano,
507 U.S. 725 (1993) ..... *passim*

United States v. Puckett,
556 U.S. 129 (2009) 4, 9

United States v. Putnam,
806 F.3d 853 (5th Cir. 2015) (per curiam) 10

United States v. Renteria-Martinez,
847 F.3d 297 (5th Cir. 2017),
reh'g en banc denied (Mar. 17, 2017) 10

United States v. Rosales-Mireles,
850 F.3d 246 (5th Cir. 2017) 1, 3, 4, 7

United States v. Sabillon-Umana,
772 F.3d 1328 (10th Cir. 2014) 9

United States v. Segura,
747 F.3d 323 (5th Cir. 2014) 4, 7

United States v. Solano-Hernandez,
847 F.3d 170 (5th Cir. 2017),
reh'g en banc denied (Mar. 17, 2017) 10

United States v. Young,
470 U.S. 1 (1985) 7, 8

United States v. Zavala,
___ F. App'x ___, 2016 WL 3455947 (5th Cir. June 23, 2016),
on remand from 136 S. Ct. 1711 (2016),
vacating 608 F. App'x 268 (5th Cir. 2015) 11

Statutes

8 U.S.C. § 1326 ..... 1, 3

28 U.S.C. § 1254(1) 1

Rules

Federal Rule of Criminal Procedure 52(b) 1, 6, 8

Supreme Court Rule 13.1 1

United States Sentencing Guideline

U.S.S.G. §2L1.2 2

Other Authority

U.S. SENTENCING COMM'N, AMENDMENTS TO THE SENTENCING GUIDELINES 38 (April 28, 2016). Available at http://www.ussc.gov/amendment-process/reader-friendly-amendments/reader-friendly-version-amendments-effective-november-1-2016 3

OPINION BELOW

On March 6, 2017, a panel of the Fifth Circuit Court of Appeals entered its opinion affirming the judgment of the United States District Court for the Western District of Texas. The opinion is reported as *United States v. Rosales-Mireles*, 850 F.3d 246 (5th Cir. 2017), and a copy is attached to this petition as an appendix.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit were entered on March 6, 2017. This petition is filed within 90 days after entry of judgment. *See* SUP. CT. R. 13.1. The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

FEDERAL RULE OF CRIMINAL PROCEDURE INVOLVED

The question presented involves Federal Rule of Criminal Procedure 52(b), which provides: "A plain error that affects substantial rights may be considered even though it was not brought to the court's attention." Fed. R. Crim. P. 52(b).

STATEMENT

Petitioner Florencio Rosales-Mireles pleaded guilty to illegal reentry, in violation of 8 U.S.C. § 1326. The district court ordered that a presentence report be prepared to assist in sentencing. In

calculating the United States Sentencing Guidelines applicable to Rosales, the probation officer recommended a total offense level of 21. The probation officer calculated the total criminal history points at 13, resulting in a criminal history category of VI. Combined with Rosales's offense level, the advisory Guidelines range was 77 to 96 months' imprisonment.

The probation officer made a mistake, however, in calculating the criminal history score. The officer counted a 2009 Texas conviction of misdemeanor assault twice, assessing four criminal history points instead of two. Without the two extra erroneously applied criminal history points, Rosales's criminal history category was V, yielding an advisory Guidelines range of 70 to 87 months. Rosales did not object to the guideline calculation error.

Counsel for Rosales instead requested a below-Guideline sentence of 41 months. Counsel argued that, under proposed amendments to the illegal reentry guideline, §2L1.2, a 41-month sentence

would be a within-Guidelines sentence.[1] The district court denied the requested variance and sentenced Rosales to 78 months' imprisonment.

On appeal, Rosales argued that the district court plainly erred by calculating his Guidelines range based on double counting the prior conviction in his criminal history. The Government agreed that the district court committed a plain error. However, it argued that the error did not affect Rosales's substantial rights, and that the court of appeals should not exercise its discretion to remedy the error.

The court of appeals held that, by adding a total of four points to Rosales's criminal history score based on the same conviction, the district court had committed a plain error. *Rosales-Mireles*, 850 F.3d at 248–49. It also held that Rosales had satisfied the third prong of plain-error review. *Id.* at 249. Without the criminal history error, Rosales's Guidelines range would have been 70 to 87 months, rather than 77 to 96 months. *Id.* And the district court did

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[1] Those proposals, which produce significantly reduced sentences for many § 1326 defendants, have since been adopted. U.S. SENTENCING COMM'N, AMENDMENTS TO THE SENTENCING GUIDELINES 36 (April 28, 2016). Available at http://www.ussc.gov/amendment-process/reader-friendly-amendments/reader-friendly-version-amendments-effective-november-1-2016 (last accessed on May 3, 2017).

not "'explicitly and unequivocally indicate that [it] would have imposed the same sentence . . . irrespective of the Guidelines range.'" *Id.* (quotation omitted).

Notwithstanding, the Fifth Circuit declared that it would not exercise its discretion under the fourth prong of plain error review to correct the error. *Id.* at 250. The court of appeals described its exercise of discretion as occurring "only where 'the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" *Id.* at 249–50 (quoting *United States v. Escalante-Reyes*, 689 F.3d 415, 419 (5th Cir. 2012) (en banc) (quoting *United States v. Puckett*, 556 U.S. 129, 135 (2009)). Such errors, the court said, are "'ones that would shock the conscience of the common man, serve as a powerful indictment against our system of justice, or seriously call into question the competence or integrity of the district judge.'" *Id.* at 250 (quoting *United States v. Segura*, 747 F.3d 323, 331 (5th Cir. 2014)). It found there to be "*no* discrepancy between the sentence and the correctly calculated range," and thus "[w]e cannot say that the error or resulting sentence would shock the conscience." *Id.* (emphasis in original). The court of appeals affirmed the sentence. *Id.* at 251.

Petitioner respectfully submits that the Fifth Circuit applied a reformulated and heightened standard for the fourth prong of

plain error review that conflicts with decisions of this Court and other circuit courts of appeals, and has created an intracircuit split.

REASONS FOR GRANTING THE WRIT

The Fifth Circuit Court of Appeals applied a reformulated and heightened standard for the fourth prong of plain error review in Rosales's case, which involved a sentencing error. The Fifth Circuit's standard conflicts with decisions by this Court, other courts of appeals, and is part of an intracircuit split. This Court should grant certiorari to clarify the correct standard to be used when the court of appeals must decide whether to exercise its discretion to correct plain sentencing error.

"A plain error that affects substantial rights may be considered, even though it was not brought to the court's attention." Fed. R. Crim. P. 52(b). In *United States v. Olano*, 507 U.S. 725 (1993), this Court articulated the familiar four-prong approach to plain error review under Rule 52(b). If the first three prongs are satisfied—an error that is plain and affects the defendant's substantial rights—then "the court of appeals has authority to order correction, but is not required to do so." *Id.* at 735. The standard for exercising that discretion under the fourth prong "was articulated in *United States v. Atkinson*, 297 U.S. 157 (1936)." *Id.* at 763. It is this: "The Court of Appeals should correct a plain forfeited error affecting substantial rights if the error 'seriously affect[s] the fairness, integrity, or publish reputation of judicial proceedings.'" *Id.* at 736 (quoting *Atkinson*, 297 U.S. at 160) (alteration in *Olano*).

The Fifth Circuit, while quoting *Olano*'s fourth-prong standard, applied a reformulated and heightened standard—does the error "shock the conscience of the common man, serve as a powerful indictment against our system of justice, or seriously call into question the competence or integrity of the district judge.'" *United States v. Rosales-Mireles*, 850 F.3d 246, 250 (5th Cir. 2017) (quoting *United States v. Segura*, 747 F.3d 323, 331 (5th Cir. 2014)). This reformulation of the *Olano* standard comes from a dissent from the en banc decision in *United States v. Escalante-Reyes*, 689 F.3d 415 (5th Cir. 2012). *See id.* at 435 (Smith, J., dissenting). The dissent drew on this Court's decisions emphasizing that "[p]lain errors are those that are 'exceptional,' 'particularly egregious,' and 'undermine the fundamental fairness' of our [judicial] system[,]" but cited no precedent of this Court to justify its particular reformulation. *Escalante-Reyes*, 689 F.3d at 435 (Smith, J., dissenting) (quoting *Atkinson*, 297 U.S. at 160, and *United States v. Young*, 470 U.S. 1, 15–16 (1985)). Rather, the dissent set out to rebuke the regular application of *Olano* for what it considered an "unwarranted extension" of the fourth prong standard. *United States v. Hernandez*, 690 F.3d 613, 624 (5th Cir. 2012) (J. Smith, dissenting).

The Fifth Circuit's reformulation of the fourth prong of the plain error review conflicts with *Olano*, which rejected this sort of heightened standard for the exercise of discretion under the fourth prong. In adopting the *Atkinson* standard, *Olano* rejected suggestions in earlier cases that Rule 52(b) should be employed only in circumstances where "'a miscarriage of justice would otherwise result.'" *Olano*, 507 U.S. at 736–37 (quoting *Young*, 470 U.S. at 15 (quoting *United States v. Frady*, 456 U.S. 152, 163 n.14 (1982))). Moreover, the adoption of a "shock the conscience" standard would elevate plain error review to the level of substantive due process, where that stringent standard is intended to reach "only the most egregious official conduct" that "violates the decencies of civilized conduct." *County of Sacramento v. Lewis*, 523 U.S. 833, 846–47 (1998) (internal quotation marks and citations omitted). Additionally, by focusing on the fourth prong as an evaluation of the district judge's competency, the court of appeals' reformulation conflicts with this Court's decision in *Henderson v. United States*, which pointed out that "plain-error review is not a grading system for trial judges." 133 S. Ct. 1121, 1129 (2013).

Although this Court has emphasized that meeting the requirements of plain error should be difficult and reversal not automatic, it has continued to apply *Olano*'s formulation of the fourth prong.

See United States v. Molina-Martinez, 136 S. Ct. 1338, 1343 (2016); *Henderson*, 133 S. Ct. at 1127, 1129; *United States v. Puckett*, 556 U.S. 129, 135 (2009). This Court has thereby recognized that "appellate courts retain broad discretion in determining whether a remand for resentencing is necessary[,]" but it has not deviated from the *Olano* standard. *Molina-Martinez*, 136 S. Ct. at 1348.

The Fifth Circuit's reformulated heightened standard also conflicts with decisions in other circuits on plain sentencing error. The Tenth Circuit has stated, for example, that "we can think of few things that affect an individual's substantial rights or the public's perception of the fairness and integrity of the judicial process more than a reasonable probability an individual will linger longer in prison than the law demands only because of an obvious judicial mistake." *United States v. Sabillon-Umana*, 772 F.3d 1328, 1335 (10th Cir. 2014). It is for that reason that the Third Circuit "generally exercise[s its] discretion to recognize a plain error in the misapplication of the Sentencing Guidelines." *United States v. Dahl*, 833 F.3d 345, 359 (3d Cir. 2016). *See also United States v. Garrett*, 528 F.3d 525, 530 (7th Cir. 2008) (exercising discretion to correct plain error which resulted in a sentence one month greater than the correct Guidelines range because "even if a sentence imposed is within the correct *as well as* incorrect Guidelines range, the case

must still be remanded for resentencing") (emphasis in original). This Court should address the circuit split caused by the Fifth Circuit's use of a reformulated and heightened standard for the fourth prong of plain error review.

Additionally, the Fifth Circuit's decision in Rosales's case contributes to a growing intracircuit conflict on applying the fourth prong. Other recent decisions by the Fifth Circuit, both published and unpublished, have relied on the reformulated standard in declining to correct plain errors. *See United States v. Renteria-Martinez*, 847 F.3d 297, 301–02 (5th Cir. 2017), *reh'g en banc denied* (Mar. 17, 2017); *United States v. Mendoza-Velasquez*, 847 F.3d 209, 213 (5th Cir. 2017) (per curiam); *United States v. Solano-Hernandez*, 847 F.3d 170, 179 (5th Cir. 2017), *reh'g en banc denied* (Mar. 17, 2017); *United States v. Handy*, 647 F. App'x. 296, 300 (5th Cir. 2016).

But in other decisions applying the *Olano* standard, the Fifth Circuit "ha[s] often exercised [its] discretion to correct error when it resulted in a custodial sentence in excess of the correct Guidelines recommendation." *United States v. Putnam*, 806 F.3d 853, 856 (5th Cir. 2015) (per curiam). That includes cases, like this one, where the sentence imposed falls within an overlap between the correct and incorrect Guidelines ranges, and a degree of error of

approximately 10% exists between the sentence imposed and the comparative sentence under the correct Guidelines range. *See, e.g., United States v. Molina-Martinez*, 824 F.3d 548 (5th Cir. 2016), *on remand from* 136 S. Ct. 1338 (2016) (vacating sentence at bottom of incorrect range that would be 10% greater (seven months) than a sentence imposed at the bottom of the correct range); *United States v. De Santiago-Guillen*, 653 F. App'x 303 (5th Cir. 2016), *on remand from* 136 S. Ct. 1711(2016) (same); *United States v. Zavala*, ___ F. App'x ___, 2016 WL 3455947 (5th Cir. June 23, 2016), *on remand from* 136 S. Ct. 1711 (2016) (vacating sentence at bottom of incorrect range, which would be 11.5% greater (30 months) than a sentence imposed at the bottom of the correct range). The Fifth Circuit's inconsistent use of the reformulated and heightened standard on the fourth prong of plain error review results in criminal defendants in similar circumstances being treated differently. Some will have their sentences of imprisonment reduced and some will not based whether the panel applies the reformulated standard.

Because the Fifth Circuit's application of a reformulated and heightened standard on the fourth prong of plain error review conflicts with decisions by this Court, other courts of appeals, and has created an intracircuit split, this Court should grant certiorari.

CONCLUSION

FOR THESE REASONS, Rosales respectfully requests that this Honorable Court grant a writ of certiorari, vacate the opinion of the court of appeals, and remand the case for further review.

Respectfully submitted.

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DATED: June 5, 2017.

APPENDIX

United States v. Rosales-Mireles,
850 F.3d 246 (5th Cir. 2017)

850 F.3d 246
United States Court of Appeals,
Fifth Circuit.

UNITED STATES of America, Plaintiff–Appellee,
v.
Florencio ROSALES–MIRELES, also known as Roberto Lozano–Alcauter, Defendant–Appellant.

No. 16-50151
|
FILED March 6, 2017

Synopsis

Background: Defendant pled guilty in the United States District Court for the Western District of Texas, Sam Sparks, J., to illegal reentry, and he appealed.

Holdings: The Court of Appeals, Jerry E. Smith, Circuit Judge, held that:

[1] district court plainly erred when it double-counted defendant's prior misdemeanor assault conviction in calculating his criminal history score;

[2] district court's plain error did not warrant reversal of his sentence; and

[3] defendant's sentence was not substantively unreasonable.

Affirmed.

West Headnotes (7)

[1] **Criminal Law**
⇦ Necessity of Objections in General

To establish plain error, defendant must show (1) error; (2) that was clear or obvious; (3) that affected his substantial rights; and (4) that seriously affects fairness, integrity or public reputation of judicial proceedings.

Cases that cite this headnote

[2] **Criminal Law**
⇦ Sentencing and Punishment

When defendant is sentenced under incorrect Guidelines range, error itself can, and most often will, be sufficient to show reasonable probability of different outcome absent error, but government remains free to point to parts of record—including relevant statements by judge—to counter any ostensible showing of prejudice that defendant may make.

Cases that cite this headnote

[3] **Criminal Law**
⇦ Sentencing and Punishment

Sentencing and Punishment
⇦ Criminal history

District court plainly erred, in sentencing defendant for illegal reentry, when it double-counted his prior misdemeanor assault conviction in calculating his criminal history score, where error resulted in higher Guidelines range, and district court did not explicitly and unequivocally indicate that it would have imposed same sentence irrespective of Guidelines range.

Cases that cite this headnote

[4] **Criminal Law**
⇦ Sentencing and Punishment

District court's error does not seriously affect fairness, integrity, or public reputation of judicial proceedings, and thus does not warrant reversal on plain error review, simply because plainly erroneous sentencing guideline range yields longer sentence than range that, on appeal, is perceived as correct; rather, types of errors that warrant reversal are ones that would shock conscience of common man, serve as powerful indictment against system of justice, or seriously call into question district court's competence or integrity.

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1 Cases that cite this headnote

[5] **Criminal Law**
⇦ Sentencing and Punishment

District court's plain error in double-counting defendant's prior misdemeanor assault conviction in calculating his criminal history score in sentencing him for illegal reentry did not seriously affect fairness, integrity, or public reputation of judicial proceedings, and thus did not warrant reversal of his sentence, even though there was reasonable probability that defendant would have been subject to different sentence but for error, where sentence imposed was in middle of properly calculated sentencing range.

Cases that cite this headnote

[6] **Sentencing and Punishment**
⇦ Factors or Purposes in General

Sentencing and Punishment
⇦ Operation and effect of guidelines in general

Within-guidelines sentence is entitled to presumption of reasonableness, which is rebutted only upon showing that sentence does not account for factor that should receive significant weight, it gives significant weight to irrelevant or improper factor, or it represents clear error of judgment in balancing sentencing factors.

Cases that cite this headnote

[7] **Aliens, Immigration, and Citizenship**
⇦ Sentencing and punishment

Sentencing and Punishment
⇦ Nature, degree, or seriousness of other misconduct

Defendant's 78-month sentence for illegal reentry was not substantively unreasonable, despite defendant's contention that district court placed too much weight on his old, prior convictions, where sentence was in middle of properly calculated sentencing range, court explicitly considered statutory sentencing factors, including nature of offense, defendant's history and characteristics, and need to protect public, deter future criminal conduct, and promote respect for law, and court noted that it was defendant's second conviction for being in United States illegally, that he had used multiple aliases to remain in United States, and that he had history of assault. 18 U.S.C.A. § 3553(a).

Cases that cite this headnote

*248 Appeal from the United States District Court for the Western District of Texas, Sam Sparks, U.S. District Judge

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Before SMITH, CLEMENT, and SOUTHWICK, Circuit Judges.

Opinion

JERRY E. SMITH, Circuit Judge:

Florencio Rosales–Mireles appeals his sentence for illegal reentry. He contends that the district court erred by counting one of his prior convictions twice when calculating the sentencing-guideline range. He also maintains that the sentence is substantively unreasonable. Finding no reversible error, we affirm.

I.

Rosales–Mireles pleaded guilty of illegal reentry in violation of 8 U.S.C. § 1326(a) and (b)(2). When calculating the criminal-history score, the probation officer counted a 2009 Texas conviction of misdemeanor assault twice, assessing two criminal-history points each

time it was counted. The total criminal-history score was calculated as 13, resulting in a criminal-history category of VI. Combined with Rosales–Mireles's offense level of 21, that criminal-history category yielded a guideline range of 77–96 months.

Rosales–Mireles did not object to the double-counting but did request a downward departure to 41 months. The district court denied the departure and sentenced Rosales–Mireles to 78 months of imprisonment and a three-year term of supervised release. Rosales–Mireles did not object to the sentence after it was imposed.

II.

[1] Rosales–Mireles assigns error to the double-counting. He concedes that he did not make that objection in district court, so we apply the plain-error standard. *See United States v. Peltier*, 505 F.3d 389, 391 (5th Cir. 2007). To establish plain error, Rosales–Mireles must show (1) an error; (2) that was clear or obvious; and (3) that affected his substantial rights. *Puckett v. United States*, 556 U.S. 129, 135, 129 S.Ct. 1423, 173 L.Ed.2d 266 (2009). "[I]f the above three prongs are satisfied, [we have] the *discretion* to remedy the error—discretion which ought to be exercised only if the error seriously affects the fairness, integrity or public reputation of judicial proceedings." *Id.* (quotation marks and alterations omitted).

A.

The government concedes that the double-counting is error, and we agree. The sentencing guidelines provide that two criminal-history points be added "for *each* prior sentence of imprisonment of at least sixty days...." U.S. Sentencing Guidelines Manual ("U.S.S.G.") § 4A1.1 (emphasis added). By adding four points based on the same conviction, the court erred. *249 Moreover, "the error is clear from the language of the Guidelines."[1] Thus, Rosales–Mireles satisfies the first two prongs.

B.

[2] To satisfy the third prong, Rosales–Mireles must show "a reasonable probability that, but for the district court's misapplication of the Guidelines, he would have received a lesser sentence."[2] "When a defendant is sentenced under an incorrect Guidelines range ... the error itself can, and most often will, be sufficient to show a reasonable probability of a different outcome absent the error." *Molina–Martinez*, 136 S.Ct. at 1345. But "[t]he Government remains free to point to parts of the record—including relevant statements by the judge—to counter any ostensible showing of prejudice the defendant may make." *Id.* at 1347 (quotation marks omitted and alteration adopted).

Had the district court not erred by double-counting Rosales–Mireles's misdemeanor-assault conviction, the guideline range would have been 70–87 months instead of 77–96 months as recommended in the presentence report. Nonetheless, the government contends that the court would have sentenced Rosales–Mireles to the same term of imprisonment even if it had not erred by double-counting. The government notes that the district court stated that it "would have not sentenced [Rosales–Mireles] to anything less than the 78 months."

But that statement, in context, does not go quite so far as saying that the court would have sentenced Rosales–Mireles to 78 months regardless of the guideline recommendation. The full statement is this: "I'll let the record reflect that under the consideration 4A1.3, when I look at the elements, I would have not sentenced Mr. Rosales to anything less than the 78 months after he's—his conduct in these cases and his conduct here today."

[3] The explanation was made in the context of denying a downward departure under U.S.S.G. § 4A1.3. Moreover, the denial was based, in part, on Rosales–Mireles's criminal history, and that history—because of the double-counting—erroneously included an extra conviction. Thus, we cannot say that the district court "explicitly and unequivocally indicate[d] that [it] would have imposed the same sentence ... irrespective of the Guidelines range."[3] Rosales–Mireles has met his burden, under the third prong, to show a reasonable probability that he would have been subject to a different sentence but for the error.

C.

[4] Even though Rosales–Mireles has satisfied the first three prongs, we must decide whether to exercise our

discretion to remedy the error. We do so only where "the error seriously affect[s] the fairness, integrity or public reputation of judicial *250 proceedings."[4] "The fourth prong ... is not satisfied simply because the 'plainly' erroneous sentencing guideline range yields a longer sentence than the range that, on appeal, we perceive as correct." *United States v. Sarabia-Martinez*, 779 F.3d 274, 278 (5th Cir. 2015).[5] Rather, "[t]he types of errors that warrant reversal are ones that would shock the conscience of the common man, serve as a powerful indictment against our system of justice, or seriously call into question the competence or integrity of the district judge." *United States v. Segura*, 747 F.3d 323, 331 (5th Cir. 2014) (quotation marks omitted).[6]

[5] We decline to exercise our discretion in this case. We sometimes exercise discretion to correct a plain error where the imposed sentence is "materially or substantially above the properly calculated range." *United States v. John*, 597 F.3d 263, 289 (5th Cir. 2010).[7] But we also have declined to use that discretion even where the discrepancy was huge.[8] Where the difference between the imposed sentence and the properly calculated range is small, we generally decline to correct the error.[9]

Here, there is *no* discrepancy between the sentence and the correctly calculated range. The court sentenced Rosales-Mireles to 78 months, which is in the middle of the proper range of 70–87 months. We cannot say that the error or resulting sentence would shock the conscience. Thus, we elect not to exercise our discretion.

III.

Rosales-Mireles contends that his sentence is substantively unreasonable because it is greater than necessary to effect the goals of 18 U.S.C. § 3553(a). Rosales-Mireles did not object to reasonableness in the district court, so we review only for plain error.[10]

[6] A within-guidelines sentence is entitled to a presumption of reasonableness, *251 and "[t]he presumption is rebutted only upon a showing that the sentence does not account for a factor that should receive significant weight, it gives significant weight to an irrelevant or improper factor, or it represents a clear error of judgment in balancing sentencing factors." *United States v. Cooks*, 589 F.3d 173, 186 (5th Cir. 2009). Rosales-Mireles's 78-month sentence is within-guidelines, as it is within the overlap of the correct (70–87 months) and incorrect (77–96 months) ranges. It is therefore presumed reasonable. *Id.*

[7] Rosales-Mireles has not rebutted the presumption. He maintains that the district court placed too much weight on his old, prior convictions. But the court considered that argument during sentencing and rejected it. The court explicitly considered a number of the § 3553(a) factors, including the nature of the offense; Rosales-Mireles's history and characteristics; and the need to protect the public, deter future criminal conduct, and promote respect for the law. In addition, the court noted that this was Rosales-Mireles's second conviction for being in the United States illegally, that he had used multiple aliases to remain in the United States, and that he had a history of assault stretching from 2001 to 2015.

The district court was in the best position to evaluate Rosales-Mireles's history and characteristics and the need for the sentence to further the objectives in § 3553(a). *See Gall v. United States*, 552 U.S. 38, 51–52, 128 S.Ct. 586, 169 L.Ed.2d 445 (2007). Accordingly, the decision is entitled to deference. *Id.* Rosales-Mireles has not rebutted the presumption of reasonableness.

The judgment of sentence is AFFIRMED.

All Citations

850 F.3d 246

Footnotes

1 *United States v. Espinoza*, 677 F.3d 730, 736 (5th Cir. 2012). *See also United States v. Blocker*, 612 F.3d 413, 416 (5th Cir. 2010), *abrogated on other grounds by Molina-Martinez v. United States*, ——U.S. ——, 136 S.Ct. 1338, 194 L.Ed.2d 444 (2016) ("As our conclusion is reached by a straightforward application of the guidelines, the error was also plain.").

2 *United States v. Martinez-Rodriguez*, 821 F.3d 659, 663–64 (5th Cir. 2016) (quoting *United States v. Pratt*, 728 F.3d 463, 481 (5th Cir. 2013) (citation omitted)).

3 *United States v. Miller*, 657 Fed.Appx. 265, 270 (5th Cir. 2016) (per curiam). *See also United States v. Mudekunye*, 646 F.3d 281, 290 (5th Cir. 2011) (per curiam).

4 *United States v. Escalante–Reyes*, 689 F.3d 415, 419 (5th Cir. 2012) (en banc) (quoting *Puckett*, 556 U.S. at 135, 129 S.Ct. 1423 (alteration in original)).

5 *See also United States v. Wooley*, 740 F.3d 359, 369 (5th Cir. 2014) ("This circuit has repeatedly emphasized that even when we find that the first three factors have been established, this fourth factor is not automatically satisfied.") (quotation marks omitted); *United States v. Ellis*, 564 F.3d 370, 378 (5th Cir. 2009) ("Not every error that increases a sentence need be corrected by a call upon plain error doctrine.").

6 *Accord United States v. Mendoza–Velasquez*, 847 F.3d 209, 213 (5th Cir. 2017) (per curiam) (citing *United States v. Scott*, 821 F.3d 562, 571 (5th Cir. 2016)).

7 *See, e.g., John*, 597 F.3d at 285–86 (exercising discretion to correct a sentence 21 months outside the correct range); *United States v. Hernandez*, 690 F.3d 613, 621–22 (5th Cir. 2012) (exercising discretion to correct a sentence 12 months outside the correct range); *Mudekunye*, 646 F.3d at 290–91 (exercising discretion to correct a sentence 19 months outside the correct range).

8 In *United States v. Wikkerink*, 841 F.3d 327, 337 (5th Cir. 2016), we declined relief under the fourth prong despite that the "correct sentence according to the Guidelines would have been 180 months [but] the district court ultimately imposed a sentence of 360 months."

9 *See, e.g., United States v. Avalos–Martinez*, 700 F.3d 148, 154 (5th Cir. 2012) (per curiam) (declining to exercise discretion where the imposed sentence exceeded the correct range by only one month); *United States v. Emanuel–Fuentes*, 639 Fed.Appx. 974, 977 (5th Cir. 2015) (per curiam) (same).

10 Rosales–Mireles notes that "[t]here is a circuit split as to whether a failure to object to the reasonableness of the sentence upon its imposition requires plain error review." He acknowledges that his argument is foreclosed, *see Peltier*, 505 F.3d at 391–92, and he raises it only to preserve it for further review.

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ORIGINAL

No. 16-9493

Supreme Court, U.S.
FILED
AUG - 9 2017
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IN THE SUPREME COURT OF THE UNITED STATES

FLORENCIO ROSALES-MIRELES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals permissibly exercised its discretion to deny relief on plain-error review of the calculation of petitioner's advisory Sentencing Guidelines range.

IN THE SUPREME COURT OF THE UNITED STATES

No. 16-9493

FLORENCIO ROSALES-MIRELES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-5) is reported at 850 F.3d 246.

JURISDICTION

The judgment of the court of appeals was entered on March 6, 2017. The petition for a writ of certiorari was filed on June 5, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Western District of Texas, petitioner was convicted of

illegally reentering the United States after having been removed following a conviction for an aggravated felony, in violation of 8 U.S.C. 1326(a) and (b)(2). He was sentenced to 78 months of imprisonment, to be followed by three years of supervised release. The court of appeals affirmed. Pet. App. 1-5.

1. In June 2015, agents with the United States Department of Homeland Security received information that petitioner, a citizen of Mexico, had been arrested for assaulting a family member and jailed in Travis County, Texas. Presentence Investigation Report (PSR) ¶ 4. A records check revealed that petitioner had previously been removed from the United States to Mexico following a conviction for aggravated assault. Id. ¶¶ 5-6. Petitioner admitted that he had reentered the United States illegally by wading across the Rio Grande River. Id. ¶ 7.

2. A federal grand jury returned an indictment charging petitioner with illegally reentering the United States after having been removed, in violation of 8 U.S.C. 1326(a) and (b)(2). Pet. App. 2; Indictment 1. Petitioner pleaded guilty to that offense without a plea agreement. Pet. App. 2; PSR ¶ 2.

The Probation Office determined that petitioner's total offense level under the Sentencing Guidelines was 21 and that his criminal-history category was VI, resulting in an advisory Guidelines range of 77 to 96 months of imprisonment. PSR ¶¶ 21, 33, 60. Petitioner did not object to the Probation Office's

recommended Guidelines calculations, although he requested a downward departure to 41 months. Pet. App. 3.

The district court denied the departure and sentenced petitioner to 78 months of imprisonment. Pet. App. 3. In rejecting petitioner's request for a downward departure, the court stated that it "would have not sentenced [petitioner] to anything less than the 78 months after * * * his conduct in these cases and his conduct here today." 2/16/16 Sent Tr. (Sent. Tr.) 9. The court further justified its sentence by recounting petitioner's prior illegal entry, his use of multiple aliases and other false identification information, and his repeated "assaultive behavior" stretching back to 2001. Id. at 9-10.

3. The court of appeals affirmed. Pet. App. 1-5.

Petitioner argued for the first time on appeal that the district court erred in calculating his criminal-history category. See Pet. C.A. Br. 8-12. Specifically, petitioner contended that the district court erroneously counted the same conviction twice and assigned him four criminal-history points for that conviction, rather than the two points that it merited. Id. at 9-10.

The court of appeals reviewed petitioner's forfeited claim under the plain-error standard. Pet. App. 3. It concluded that petitioner had satisfied the first three prongs of that standard, namely, that he "show (1) an error; (2) that was clear or obvious; and (3) that affected his substantial rights." Ibid. The court

held (and the government conceded) that the district court erred in double-counting a single conviction and that the error was "clear from the language of the Guidelines." Ibid. (citation omitted). The court further observed that, absent the error, petitioner's advisory sentencing range would have been 70 to 87 months of imprisonment, rather than 77 to 96 months. Ibid. Because the error affected the Guidelines calculation and the court could not say that the district court "explicitly and unequivocally" indicated that it would have imposed the same sentence under the correct Guidelines range, the court of appeals concluded that the error affected petitioner's substantial rights. Ibid. (citation omitted).

The court of appeals, however, "elect[ed] not to exercise [its] discretion" to correct the Guidelines error. Pet. App. 4. It explained that such an exercise of discretion would be appropriate only if petitioner established the fourth prong of plain-error review, which requires a showing that the error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." Ibid. (quoting United States v. Escalante-Reyes, 689 F.3d 415, 419 (5th Cir. 2012) (en banc)). The court noted that "[t]he fourth prong is not satisfied simply because the 'plainly' erroneous sentencing guideline range yields a longer sentence than the range that, on appeal, we perceive as correct." Ibid. (citation omitted). "Rather, '[t]he types of

errors that warrant reversal are ones that would shock the conscience of the common man, serve as a powerful indictment against our system of justice, or seriously call into question the competence or integrity of the district judge.'" Ibid. (quoting United States v. Segura, 747 F.3d 323, 331 (5th Cir. 2014)).

The court of appeals concluded that this case did not present such an error. In particular, there was "no discrepancy between the sentence and the correctly calculated range," and the district court had sentenced petitioner within the middle of the correct range. Pet. App. 4 (emphasis in original).

ARGUMENT

Petitioner contends (Pet. 6-12) that the court of appeals' decision misapplies the plain-error standard and conflicts with decisions of other courts of appeals. Those contentions lack merit. The court's decision is correct. And petitioner significantly overstates the extent of the disagreement among the circuits over whether a Guidelines error usually satisfies the fourth prong of the plain-error standard, which is largely attributable to differences in how those courts exercise their discretion rather than a dispute over the legal standards governing plain-error review. In any event, even if a circuit conflict existed on that issue, this case would be a poor vehicle for resolving it. The petition for a writ of certiorari should be denied.

1. When a defendant fails to object to an alleged error in the district court, he may not obtain relief from that error on appeal unless he establishes reversible "plain error" under Federal Rule of Criminal Procedure 52(b). See Puckett v. United States, 556 U.S. 129, 134-135 (2009). Reversal for plain error "is to be used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result." United States v. Young, 470 U.S. 1, 15 (1985) (citation and internal quotation marks omitted). To establish reversible plain error, a defendant must show "(1) 'error,' (2) that is 'plain,' and (3) that 'affect[s] substantial rights.'" Johnson v. United States, 520 U.S. 461, 467 (1997) (brackets in original) (quoting United States v. Olano, 507 U.S. 725, 732 (1993)). If those prerequisites are satisfied, the court of appeals has discretion to correct the error based on its assessment of whether "(4) the error seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." Ibid. (internal quotation marks omitted; brackets in original) (quoting Young, 470 U.S. at 15). "Meeting all four prongs is difficult, 'as it should be.'" Puckett, 556 U.S. at 135 (quoting United States v. Dominguez Benitez, 542 U.S. 74, 83 n.9 (2004)).

This Court has consistently held that a "per se approach to plain-error review is flawed" and that "[t]he fourth prong" of the plain-error standard "is meant to be applied on a case-specific

and fact-intensive basis." Puckett, 556 U.S. at 142 (citation, emphasis, and internal quotation marks omitted). As a consequence, "a plain error affecting substantial rights does not, without more, satisfy" the fourth prong of plain-error review, "for otherwise the discretion afforded by Rule 52(b) would be illusory." Olano, 507 U.S. at 737. This Court has thus rebuffed efforts to eliminate the fourth prong or to collapse it into one of the other three. See, e.g., Puckett, 556 U.S. at 142-143 (rejecting contention "that the fourth prong of plain-error review * * * has no application" to claims involving breaches of plea agreements because "there may well be countervailing factors in particular cases" even if the other three prongs are satisfied). And the Court has relied upon the fourth prong to affirm convictions despite obvious error. See United States v. Cotton, 535 U.S. 625, 632-633 (2002) (concluding that failure to allege drug quantity in indictment did not merit reversal under fourth prong where evidence of drug quantity was "overwhelming") (citation omitted); Johnson, 520 U.S. at 469-470 (same for error in jury instructions).

If there were any doubt as to courts of appeals' discretion under the fourth plain-error prong in Guidelines cases, this Court's recent decision in Molina-Martinez v. United States, 136 S. Ct. 1338 (2016), dispelled that doubt. The Court in Molina-Martinez held that, in light of the Guidelines' importance to federal sentencing, a district court's error in applying an

incorrect Guidelines range "itself can, and most often will, be sufficient to show a reasonable probability of a different outcome" under the third plain-error prong. Id. at 1345. But the Court did not hold that such an error, without more, automatically satisfies the fourth prong as well. To the contrary, the Court made clear that, "[u]nder the Olano framework, appellate courts retain broad discretion in determining whether a remand for resentencing is necessary" in the particular circumstances of a case. Id. at 1348.

2. a. The court of appeals did not abuse its discretion in concluding that petitioner failed to show that the district court's Guidelines error seriously affected the fairness, integrity, or public reputation of the proceedings. The court of appeals properly conducted a "case-specific and fact-intensive" inquiry, Puckett, 556 U.S. at 142, and based its discretionary determination on the fact that there was "no discrepancy" between petitioner's sentence and the correctly calculated Guidelines range and that petitioner's sentence fell within the middle of that range, Pet. App. 4 (emphasis in original). On those facts, the court of appeals correctly concluded that the district court's mistake did not represent the sort of serious error that requires reversal under the fourth plain-error prong. Ibid.

b. Petitioner's contrary arguments lack merit. Petitioner contends (Pet. 6-9) that the court of appeals' description of the

fourth prong incorrectly imposes a "reformulated and heightened standard" that departs from this Court's decision in Olano. In Olano, this Court repeatedly emphasized that a court of appeals retains discretion to determine whether it is necessary to correct an unpreserved "error [that] is 'plain' and 'affect[s] substantial rights.'" 507 U.S. at 735 (brackets in original). The Court made clear that, while a court of appeals has the authority to order correction of such an error, it "is not required to do so." Ibid. (emphasis added). The Court further explained that the court of appeals may exercise that discretion when it finds not only that the plain error affected the petitioner's substantial rights, but also that it "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." Id. at 736 (emphasis added; brackets in original); see also Puckett, 556 U.S. at 135.

The court of appeals in this case twice recited that "seriously affects" formulation of the fourth plain-error prong from Puckett and Olano. Pet. App. 3, 4. It further elaborated by stating that errors warrant reversal when they "would shock the conscience of the common man, serve as a powerful indictment against our system of justice, or seriously call into question the competence or integrity of the district judge." Id. at 4 (citation omitted). The court did not appear to view the two formulations as requiring a different result on the facts of this case. See ibid. Petitioner does not explain how the court's analysis would

have turned out differently if the court had omitted its gloss on the Puckett and Olano standard. Nor does petitioner suggest any kind of error that would "seriously affect[] the fairness, integrity or public reputation of judicial proceedings," as Olano requires, 506 U.S. at 736, but would not also "serve as a powerful indictment against our system of justice," Pet. App. 4.

Petitioner contends that Olano "rejected suggestions in earlier cases that Rule 52(b) should be employed only in circumstances where 'a miscarriage of justice would otherwise result.'" Pet. 8 (quoting Olano, 507 U.S. at 736-737). That contention is misplaced. The Court in Olano stated that it had previously "explained that the discretion conferred by Rule 52(b) should be employed in those circumstances in which a miscarriage of justice would otherwise result." 507 U.S. at 736 (citation and internal quotation marks omitted). The Court did not disavow that explanation, but it cautioned that the term "miscarriage of justice" should not be given the same meaning it has in the collateral-review context, where it "means that the defendant is actually innocent." Ibid. The Court observed that in the plain-error context, it had "never held that a Rule 52(b) remedy is only warranted in cases of actual innocence." Ibid. The court of appeals did not impose any such limitation here.

Petitioner further contends (Pet. 8) that the court of appeals adopted "a 'shock the conscience' standard [that] would elevate

plain error review to the level of substantive due process." That contention misreads the court's decision. The court stated that it exercises discretion to correct plain errors that, "if left uncorrected, would shock the conscience of the common man, serve as a powerful indictment against our system of justice, or seriously call into question the competence or integrity of the district judge." Pet. App. 4 (emphasis added; citation omitted). In other words, the court indicated that an uncorrected error that "shock[s] the conscience" is a sufficient, but not necessary, condition for the discretionary correction of a plain error. Ibid. Consistent with that understanding, the Fifth Circuit has -- as petitioner acknowledges (Pet. 10-11) -- regularly exercised its discretion to grant resentencing in other plain-error cases, without requiring that the uncorrected error "shock the conscience." See, e.g., United States v. Dias, No. 16-40862, 2017 WL 1048069, at *2 (Mar. 17, 2017) (per curiam); United States v. Rojas-Ibarra, 669 Fed. Appx. 269, 270 (2016) (per curiam); United States v. Miller, 657 Fed. Appx. 265, 270-271 (2016) (per curiam); United States v. Santacruz-Hernandez, 648 Fed. Appx. 456, 458 (2016) (per curiam); United States v. Martinez-Rodriguez, 821 F.3d 659, 666-667 (2016); United States v. Alegria-Alvarez, 471 Fed. Appx. 271, 275-276 (2012) (per curiam); United States v. Andino-Ortega, 608 F.3d 305, 311-312 (2010).

c. Petitioner also argues (Pet. 8) that the court of appeals' application of the fourth prong of plain-error review conflicts with this Court's decision in Henderson v. United States, 133 S. Ct. 1121 (2013). That argument lacks merit. In Henderson, this Court addressed the second prong of plain-error review, holding that, regardless of "whether a legal question was settled or unsettled at the time of trial, 'it is enough that an error be "plain" at the time of appellate consideration' for '[t]he second part of the * * * Olano test [to be] satisfied.'" Id. at 1130-1131 (brackets in original) (quoting Johnson, 520 U.S. at 468). In so doing, it rejected an approach that would involve "a grading system for trial judges." Id. at 1129. But it did so in part because of the separate backstop provided by the fourth prong, which "restricts the appellate court's authority to correct an error to those errors that would, in fact, seriously affect the fairness, integrity, or public reputation of judicial proceedings." Ibid. Henderson's holding about the second prong is therefore unavailing to petitioner.

In any event, the court of appeals' decision here did not turn on whether the error called into question the competence or integrity of the district judge. Rather, the court focused on the lack of any disparity between petitioner's sentence and the correct advisory Guidelines range. Pet. App. 4.

3. Petitioner contends (Pet. 9-10) that the Fifth Circuit's "heightened standard" conflicts with other circuits' application of the fourth prong of the plain-error standard to Guidelines errors. This Court recently denied certiorari in Patino-Almendariz v. United States, 137 S. Ct. 2118 (2017), which raised a similar claim of circuit conflict, and the same result is warranted here.

a. The circuits have generally followed this Court's directive to conduct "a case-specific and fact-intensive" inquiry. Puckett, 556 U.S. at 142. Some circuits, however, have taken an approach to Guidelines errors that is arguably in tension with that directive. As petitioner notes (Pet. 9), the Tenth Circuit has adopted a presumption that relief should be granted under the fourth plain-error prong where a clear Guidelines error affects the defendant's substantial rights under the third prong. See United States v. Sabillon-Umana, 772 F.3d 1328, 1333 (2014). Two other courts of appeals have stated that they "ordinarily" will grant relief in such cases, United States v. Figueroa-Ocasio, 805 F.3d 360, 374 (1st Cir. 2015); see United States v. Joseph, 716 F.3d 1273, 1281 (9th Cir. 2013).

Petitioner also cites (Pet. 9) decisions from the Third and Seventh Circuits, but both circuits apply a more nuanced approach than petitioner suggests. In United States v. Dahl, 833 F.3d 345, 359 (2016), the Third Circuit noted that it "generally" exercises

discretion to grant relief in cases involving plain Guidelines errors. But the Third Circuit has also cautioned that its "broad discretion" under the fourth plain-error prong "should not be exercised reflexively" in Guidelines cases. United States v. Calabretta, 831 F.3d 128, 140 (2016), abrogated on other grounds by Beckles v. United States, 137 S. Ct. 886 (2017). Similarly, the Seventh Circuit indicated in United States v. Garrett, 528 F.3d 525, 530 (2008), that it ordinarily remands in cases in which an error "led to a higher Guideline range." In other cases, however, the Seventh Circuit has not applied such a categorical rule. See United States v. Doss, 741 F.3d 763, 768 (2013) (considering whether Guidelines error "impacted the fairness of the proceedings" in deciding whether "to exercise our discretion to correct the error") (citation omitted); cf. United States v. Burns, 843 F.3d 679, 689 (7th Cir. 2016) (concluding that a Guidelines error "that significantly increases a defendant's prison sentence without a proper factual basis" is an appropriate scenario in which to exercise discretion under the fourth prong).

Any disparity in the courts of appeals' application of the fourth plain-error prong in Guidelines cases is largely attributable to differences in how those courts choose to exercise their discretion, rather than disagreements over the legal standards for plain error. All circuits, including those that have adopted a general presumption of resentencing for Guidelines

errors, agree that the fourth prong requires the exercise of judicial discretion. See, e.g., Figueroa-Ocasio, 805 F.3d at 367; Joseph, 716 F.3d at 1277, 1281; United States v. Meacham, 567 F.3d 1184, 1190 (10th Cir. 2009). The existence of variations in appellate courts' exercise of that discretion, including different approaches to the question of how often resentencing should be granted to correct an unpreserved claim of Guidelines error, does not warrant this Court's review. Cf. Ortega-Rodriguez v. United States, 507 U.S. 234, 251 n.24 (1993) (noting that courts of appeals may "vary considerably" in their exercise of supervisory authority).

b. Petitioner also argues (Pet. 10-11) that the decision below "contributes to a growing intracircuit conflict" in the Fifth Circuit about the fourth plain-error prong. But the Court does not ordinarily grant certiorari to resolve intracircuit conflicts. See Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam). Doing so would be unwarranted here. The omission of the elaboration on the Olano standard at issue here from a number of recent Fifth Circuit decisions suggests either that the court of appeals does not believe that the elaboration creates a distinct substantive standard, or that the issue has not been fully settled in that court.

4. Even if the question presented merited review, this case would be an unsuitable vehicle because petitioner is unlikely to

benefit from a decision in his favor. First, there is no discrepancy between petitioner's sentence of 78 months and the proper advisory Guidelines range of 70-87 months; the imposed sentence falls squarely in the middle of the correct range. Even in cases in which the court of appeals has omitted the particular fourth-prong formulation used here, it has declined to correct errors "[w]here the difference between the imposed sentence and the properly calculated range is small." Pet. App. 4 (citing United States v. Emanuel-Fuentes, 639 Fed. Appx. 974, 977 (5th Cir. 2015) (per curiam); United States v. Avalos-Martinez, 700 F.3d 148, 154 (5th Cir. 2012), cert. denied, 133 S. Ct. 1276 (2013)).

Second, if the case were ultimately remanded to the district court for resentencing, petitioner would likely receive the same sentence. The district court stated that it "would have not sentenced [petitioner] to anything less than the 78 months after * * * his conduct in these cases and his conduct here today." Sent. Tr. 9. After reviewing petitioner's criminal history, the court further observed that it had imposed an "adequate" and "just punishment for his offense." Id. at 10. In addition, the court selected a sentence above the minimum end of the incorrect Guidelines range and denied petitioner's motion for a downward departure, confirming that it viewed petitioner's 78-month sentence as appropriate in this case. Although the court of

appeals did not believe that, for purposes of the third plain-error prong, the district court's statements at sentencing "explicitly and unequivocally" demonstrated that the district court would have imposed the same sentence under a revised Guidelines range, Pet. App. 3 (citation omitted), those statements suggest that the district court would reach the same result if resentencing were ordered.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 2017

No. 16-9493

IN THE SUPREME COURT OF THE UNITED STATES

FLORENCIO ROSALES-MIRELES, PETITIONER

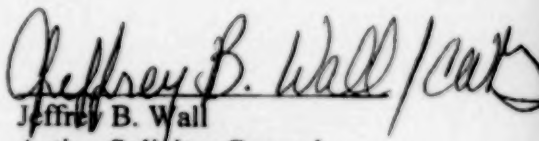
v.

UNITED STATES OF AMERICA

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served with copies of the **BRIEF FOR THE UNITED STATES IN OPPOSITION** via email and first-class mail, postage prepaid, this 9th day of August 2017.

[See Attached Service List]



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August 9, 2017

Due to the continuing delay in receiving incoming mail at the Department of Justice, in addition to mailing your brief via first-class mail, we would appreciate a fax or email copy of your brief. If that is acceptable to you, please fax your brief to Charlene Goodwin, Case Management Supervisor, Office of the Solicitor General, at (202) 514-8844, or email at **SupremeCtBriefs@USDOJ.gov.** Ms. Goodwin's phone number is (202) 514-2217 or 2218. Thank you for your consideration of this request.

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16-9493
ROSALES-MIRELES, FLORENCIO
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ORIGINAL

No. 16-9493

In the Supreme Court of the United States

DISTRIBUTED
AUG 25 2017

October Term, 2016

FILED
AUG 22 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

FLORENCIO ROSALES-MIRELES, *PETITIONER*,

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTRODUCTION 1

ARGUMENTS AND AUTHORITIES 2

I. The Fifth Circuit's Heightened Standard of Plain Error Review is Erroneous. 2

II. The Government Underestimates the Significance of the Inconsistent Applications of the Plain Error Standard. 3

III. Rosales's Case is a Good Vehicle for Resolving the Question Presented. 4

CONCLUSION 6

TABLE OF AUTHORITIES

Cases

Henderson v. United States,
133 S. Ct. 1121 (2013) 4

United States v. Molina-Martinez,
824 F.3d 548 (5th Cir. 2016),
on remand from 136 S. Ct. 1338 (2016) 3, 4

United States v. Olano,
507 U.S. 725 (1993) 1

United States v. Sabillón-Umana,
772 F.3d 1328 (10th Cir. 2014) 4, 5

Rule

Federal Rule of Criminal Procedure 52(b) 5

INTRODUCTION

Petitioner Florencio Rosales-Mireles asks the Court to grant a writ of certiorari to resolve a circuit split over the proper standard for applying the fourth prong of plain error review. Here, Rosales argued that the district court plainly erred in calculating his Sentencing Guidelines range. The court of appeals held that there was error and that the error was plain and affected Rosales's substantial rights. But the court declined to exercise its discretion to correct the plain error on the ground that it was not one that would "'shock the conscience of the common man, serve as a powerful indictment against our system of justice, or seriously call into question the competence or integrity of the district judge.'" Pet. App. 4. The Fifth Circuit's fourth-prong standard conflicts with other circuits' approach to plain Guidelines errors, as well as with this Court's decision in *United States v. Olano*, 507 U.S. 725 (1993).

The Government urges the Court to deny Rosales's petition, arguing that the Fifth Circuit's decision is correct; any difference among the circuits results from variations in the exercise of fourth-prong discretion, rather than a dispute over the standard for exercising that discretion; and Rosales's case is an unsuitable vehicle for addressing the question presented. Rosales replies.

ARGUMENTS AND AUTHORITIES

I. The Fifth Circuit's Heightened Standard of Plain Error Review is Erroneous.

The Government argues that the Fifth Circuit's refusal to correct the plain error in this case was merely an exercise of the court's broad discretion. B.I.O. 6–10. The Government acknowledges that the Fifth Circuit applied "two formulations" of the fourth-prong, but argues that Rosales failed to explain how the outcome would have been different had the Fifth Circuit not applied the extra "gloss" that the error must "shock the conscience" to warrant relief. B.I.O. 9–10. The Government is wrong.

The Fifth Circuit determined that "no discrepancy" exists, and thus relief is not warranted, because the sentence falls within an overlap between the correct and incorrect Guidelines ranges. Pet. App. 4. The Government argues that Rosales failed to explain how he would have succeeded had the court "omitted its gloss." B.I.O. 9–10. However, the Government acknowledged that Rosales had cited cases where the Fifth Circuit did not apply the heightened standard and vacated sentences that fell within overlapping Guidelines ranges or had the similar degree of error. B.I.O. 11; *see also* Pet. 10–11. Indeed, for a case like Rosales's, where the sentence imposed falls within overlapping Guidelines ranges, it is the heightened standard that affected the outcome. *Compare Rosales*,

850 F.3d 246 (affirming sentence with 7-month discrepancy), *with United States v. Molina-Martinez*, 824 F.3d 548 (5th Cir. 2016), *on remand from* 136 S. Ct. 1338 (2016) (vacating sentence with 7-month discrepancy). *See* Pet. 10–11.

II. The Government Underestimates the Significance of the Inconsistent Applications of the Plain Error Standard.

The Government does not dispute that "tension" exists between the courts of appeals in how to apply the fourth prong. B.I.O. 13–15. Nor does it cite to any circuits that apply the same heightened standard as the Fifth Circuit. But the Government contends that any disparity in plain-error outcomes between the Fifth Circuit and other courts of appeals "is largely attributable to differences in how those courts choose to exercise their discretion, rather than disagreements over the legal standards for plain error." B.I.O. 14. This is a distinction without a difference. How courts choose to exercise their discretion depends on the standard applied to the fourth prong.

The cases cited by Rosales and the Government highlight the broad extremes in the standards applied by courts of appeals under the fourth prong when Guidelines errors exist. Pet. 9–11; B.I.O. 13–15. On one hand, the Fifth Circuit applied a heightened "shocks the conscience" standard, traceable to a dissenting opinion that eliminates relief to petitioners, like Rosales, whose sentence

falls within an overlap between Guidelines ranges. Pet. App. 4. On the other hand, the Tenth Circuit applies a presumption that relief is granted when Guidelines errors are committed. B.I.O. 13 (citing *United States v. Sabillon-Umana*, 772 F.3d 1328, 1333 (10th Cir. 2014)). The existence of wide variation in sentencing outcomes is evidence, not of a singular standard applied to specific cases, but the application of distinct legal standards.

Courts of appeals are not entitled to apply plain error review in idiosyncratic ways, which is why this Court has granted certiorari in recent years to resolve circuit splits over application of the plain error standard. *See Molina-Martinez v. United States*, 136 S. Ct. 1338 (2016); *Henderson v. United States*, 133 S. Ct. 1121 (2013). The Government has provided no authority, nor any good reason, why courts of appeals should be allowed to apply the fourth prong of the plain-error standard in drastically different ways. Rather, the fact that such variation exists is a traditional and appropriate reason for this Court to exercise its certiorari jurisdiction.

III. Rosales's Case is a Good Vehicle for Resolving the Question Presented.

The Government argues that this case is not a good vehicle for resolving the question presented, for two reasons. First, the Government argues that there is "no discrepancy" in this case because Rosales's sentence falls within an overlap between the correct and

incorrect Guidelines ranges. B.I.O. 16. Cases that involve overlapping ranges exaggerate the effect of the circuit split. Under the Fifth Circuit's "shocks the conscience" standard, such cases are barred from relief. If that same defendant were to be sentenced in the Tenth Circuit, the defendant receives a presumption that relief will be granted. *See Sabillon-Umana*, 772 F.3d at 1333.

Second, the Government argues that Rosales would have received the same sentence absent the error. B.I.O. 16. The Government's assertion directly conflicts with the Fifth Circuit's finding on the third prong of plain error—that the error affected Rosales's substantial rights—because there was insufficient evidence to conclude that he would have received the same sentence had the district court considered the correct Guidelines range. *Rosales*, 850 F.3d at 249.

In sum, this petition raises an important question respecting the application of the plain-error doctrine of Rule 52(b) in the context of Sentencing Guidelines errors. The Fifth Circuit's answer to that question directly conflicts with the answer given by the Third, Ninth, and Tenth Circuits. Accordingly, the Court should grant certiorari to resolve this question.

CONCLUSION

For these reasons, Rosales asks the Court to grant a writ of certiorari.

Respectfully submitted.

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DATED: August 22, 2017

No. 16-9493

In the Supreme Court of the United States

October Term, 2016

FLORENCIO ROSALES-MIRELES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

CERTIFICATE OF SERVICE

The undersigned, an attorney, a member of the Bar of this Court, certifies that pursuant to Rule 29.3, Supreme Court Rules, she served the Reply to the Brief for the United States of America in Opposition on the Counsel for Respondent by electronic mail and by enclosing one copy in an envelope, with first-class postage prepaid, addressed to counsel of record at his post office address:

The Honorable Jeffrey B. Wall
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and depositing same in a United States mailbox at San Antonio, Texas, on August 22, 2017; and further certifies that all parties required to be served have been served.

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No. 16-9493

IN THE

Supreme Court of the United States

FLORENCIO ROSALES-MIRELES,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

JOINT APPENDIX

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CERTIORARI GRANTED: SEPT. 28, 2017

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TABLE OF CONTENTS

Page

United States District Court for the Western District of Texas (Austin), *United States* v. *Lozano-Alcauter*, No. 1:15-cr-00297-SS, Relevant Docket Entries 1

United States Court of Appeals for the Fifth Circuit, *United States* v. *Florencio Rosales-Mireles*, No. 16-50151, Relevant Docket Entries 7

Indictment, *United States* v. *Robert Lozano-Alcauter aka: Florencio Rosales-Mireles*, No. 1:15-cr-00297-SS (W.D. Tex. Oct. 6, 2015) 10

Transcript, *United States* v. *Florencio Rosales-Mireles*, No. 1:15-cr-00297-SS (W.D. Tex. Feb. 16, 2016) 12

Judgment, *United States* v. *Robert Lozano-Alcauter aka: Florencio Rosales-Mireles*, No. 1:15-cr-00297-SS (W.D. Tex. Feb. 16, 2016) 22

Opinion, *United States* v. *Florencio Rosales-Mireles*, No. 16-50151 (5th Cir. Mar. 6, 2017) 32

Judgment, *United States* v. *Florencio Rosales-Mireles*, No. 16-50151 (5th Cir. Mar. 6, 2017) 39

Order List: 582 U.S. (Sept. 28, 2017), Excerpt 40

U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS (AUSTIN)

Criminal Docket For Case #: 1:15-cr-00297-SS-1

UNITED STATES OF AMERICA,

v.

LOZANO-ALCAUTER,

RELEVANT DOCKET ENTRIES

DATE	NO.	DOCKET TEXT
09/24/2015	1	COMPLAINT Signed by State Judge Karen Sage as to Roberto Lozano-Alcauter (1). (jmw) [1:15-mj-00459-AWA] (Entered: 09/24/2015)
09/24/2015		Arrest of Roberto Lozano-Alcauter. (jmw) [1:15-mj-00459-AWA] (Entered: 09/24/2015)
		* * *
09/24/2015	4	ORDER APPOINTING FEDERAL PUBLIC DEFENDER as to Roberto Lozano-Alcauter. David M.C. Peterson appointed. Signed by Judge Andrew W. Austin. (kkc) [1:15-mj-00459-AWA] (Entered: 09/24/2015)
		* * *
10/06/2015	9	INDICTMENT(Redacted Version) filed. Unredacted document sealed pursuant to E-Government Act of 2002 as to Roberto Lozano-Alcauter (1) count(s) 1. (td) (Entered: 10/06/2015)

DATE	NO.	DOCKET TEXT
		* * *
11/18/2015	17	Minute Entry for proceedings held before Judge Andrew W. Austin: Rearraignment held on 11/18/2015; Defendant Informed of Rights. Plea of guilty entered as to Roberto Lozano-Alcauter (1) Count 1; Referred to Probation for Presentence Report. True Name of Deft. Florencio Rosales-Mireles. (Minute entry documents are not available electronically.) (Court Reporter ERO.) (os) (Entered: 11/18/2015)
11/18/2015		True Name of Defendant as to Roberto Lozano-Alcauter. True name of defendant is: Florencio Rosales-Mireles. (os) (Entered: 11/18/2015)
11/18/2015	18	FINDINGS OF FACT AND RECOMMENDATION on felony guilty plea before the United States Magistrate Judge as to Florencio Rosales-Mireles. Signed by Judge Andrew W. Austin. (os) (Entered: 11/18/2015)
		* * *
11/19/2015	21	ORDER accepting re 18 Findings of Fact on Plea as to Florencio Rosales-Mireles. Guilty plea accepted.. Signed by Judge Sam Sparks. (os) (Entered: 11/19/2015)

DATE	NO.	DOCKET TEXT
01/14/2016	22	INITIAL PRESENTENCE REPORT as to Florencio Rosales-Mireles by Officer Shelley Flanary. Objections to the PSR must be submitted directly to the Probation Department. Instructions for viewing the report/worksheet are available here. (Document is available only to the attorney of record and AUSA for 10 days) (Attachments: # 1 Certificate of disclosure)(Frost, J.) (Entered: 01/14/2016)
		* * *
01/28/2016	24	ADDENDUM AND REVISED PRESENTENCE REPORT as to Florencio Rosales-Mireles by Officer Shelley Flanary. Instructions for viewing the report/worksheet are available here. (Document is available only to the attorney of record and AUSA for 10 days) (Attachments: # 1 Addendum) (Frost, J.) (Entered: 01/28/2016)
02/03/2016	25	SEALED PRESENTENCE INVESTIGATION REPORT Filed as to Florencio Rosales-Mireles by Officer Shelley Flanary. (Document available to court only) (Attachments: # (1 - 2)) (Frost, J.) (Entered: 02/03/2016)
02/10/2016	26	MOTION *for Non-Guidelines Sentence and Memorandum in Support* by Florencio Rosales-Mireles. (Attachments: # 1 Proposed Order, # 2 Exhibit Letters in Support)(Peterson, David) (Entered: 02/10/2016)

DATE	NO.	DOCKET TEXT
02/16/2016	27	Minute Entry for proceedings held before Judge Sam Sparks:Sentencing held on 2/16/2016 for Florencio Rosales-Mireles (1), Count(s) 1, Imprisonment 78 months, 3 years supervised release, $100.00 special assessment (non-reporting). (Minute entry documents are not available electronically.) (Court Reporter Lily Reznik.) (td) (Entered: 02/17/2016)
02/16/2016	28	SEALED PRESENTENCE INVESTIGATION REPORT placed under seal and available to the court only as to Florencio Rosales-Mireles. (td) (Entered: 02/17/2016)
02/16/2016	29	JUDGMENT AND COMMITMENT as to Florencio Rosales-Mireles. Signed by Judge Sam Sparks. (td) (Entered: 02/17/2016)
02/16/2016	30	Sealed Statement of Reasons as to Florencio Rosales-Mireles (SOR documents are not available electronically.) (td) (Entered: 02/17/2016)
		* * *
02/18/2016	33	NOTICE OF APPEAL following 32 Notice of Appeal (E-Filed) by Florencio Rosales-Mireles Per 5th Circuit rules, the appellant has 14 days, from the filing of the Notice of Appeal, to order the transcript. To order a transcript, the appellant should fill out Form DKT-13 (Tran-

DATE	NO.	DOCKET TEXT
		script Order) and follow the instructions set out on the form. If the appellant has a court appointed attorney under CJA, the Form CJA 24 should also be completed. Both forms are available in the Clerk's Office or by clicking the hyperlinks above. (td) (Entered: 02/18/2016)
		* * *
03/22/2016	36	TRANSCRIPT filed of Proceedings as to Florencio Rosales-Mireles held on February 16, 2016 Proceedings Transcribed: Sentencing. Court Reporter/Transcriber Lily I. Reznik, Telephone number 512-391-8792. Parties are notified of their duty to review the transcript to ensure compliance with the FRCP 5.2(a)/FRCrP 49.1(a). A copy may be purchased from the court reporter or viewed at the clerk's office public terminal. If redaction is necessary, a Notice of Redaction Request must be filed within 21 days. If no such Notice is filed, the transcript will be made available via PACER without redaction after 90 calendar days. The clerk will mail a copy of this notice to parties not electronically noticed. Redaction Request due 4/12/2016, Redacted Transcript Deadline set for 4/22/2016, Release of Transcript Restriction set for 6/20/2016, Appeal

DATE	NO.	DOCKET TEXT
		Record due by 4/6/2016, (Reznik, Lily) (Entered: 03/22/2016)
		* * *
04/08/2016	40	Redacted Transcript filed re: 36 Transcript in case as to Florencio Rosales-Mireles (Reznik, Lily) (Entered: 04/08/2016)
		* * *
03/28/2017	43	JUDGMENT/MANDATE of USCA (certified copy) as to Florencio Rosales-Mireles. Affirming the District Court re: 32 Notice of Appeal (E-Filed).(td) (Entered: 03/28/2017)
		* * *

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Court of Appeals Docket #: 16-50151

UNITED STATES OF AMERICA,

v.

FLORENCIO ROSALES-MIRELES,

RELEVANT DOCKET ENTRIES

DATE	DOCKET TEXT
02/19/2016	DIRECT CRIMINAL CASE docketed. NOA filed by Appellant Mr. Florencio Rosales-Mireles [16-50151] (CAS)
	* * *
05/31/2016	APPELLANTS BRIEF FILED A/Pet's Brief deadline satisfied. Paper Copies of Brief due on 06/06/2016 for Appellant Florencio Rosales-Mireles.. Appellee's Brief due on 07/05/2016 for Appellee United States of America [16-50151] REVIEWED AND/OR EDITED - The original text prior to review appeared as follows: APPELLANT'S BRIEF FILED by Mr. Florencio Rosales-Mireles. Date of service: 05/31/2016 via email - Attorney for Appellants: Davidson, Franco; Attorney for Appellee: Gay [16-50151] (Kristin L. Davidson)

DATE	DOCKET TEXT
	* * *
08/04/2016	APPELLEE'S BRIEF FILED E/Res's Brief deadline satisfied. Paper Copies of Brief due on 08/15/2016 for Appellee United States of America.. Reply Brief due on 08/22/2016 for Appellant Florencio Rosales-Mireles [16-50151] REVIEWED AND/OR EDITED - The original text prior to review appeared as follows: APPELLEE'S BRIEF FILED by USA. Date of service: 08/04/2016 via email - Attorney for Appellants: Davidson, Franco; Attorney for Appellees: Bhagat, Gay [16-50151] (Joseph H. Gay Jr.)
	* * *
08/29/2016	APPELLANT'S REPLY BRIEF FILED Reply Brief deadline satisfied. Paper Copies of Brief due on 09/06/2016 for Appellant Florencio Rosales-Mireles. [16-50151] REVIEWED AND/OR EDITED - The original text prior to review appeared as follows: APPELLANTS REPLY BRIEF FILED by Mr. Florencio Rosales-Mireles. Date of service: 08/29/2016 via email - Attorney for Appellants: Davidson, Franco; Attorney for Appellees: Bhagat, Gay [16-50151] (Kristin L. Davidson)
	* * *

DATE	DOCKET TEXT
03/06/2017	PUBLISHED OPINION FILED. [16-50151 Affirmed] Judge: JES , Judge: EBC , Judge: LHS Mandate pull date is 03/27/2017 for Appellant Florencio Rosales-Mireles [16-50151] (JMA)
03/06/2017	JUDGMENT ENTERED AND FILED. [16-50151] (JMA)
03/28/2017	MANDATE ISSUED. Mandate pull date satisfied. [16-50151] (RSM)
06/12/2017	SUPREME COURT NOTICE that petition for writ of certiorari [8518793-2] was filed by Appellant Mr. Florencio Rosales-Mireles on 06/05/2017. Supreme Court Number: 16-9493. [16-50151] (CAV)
09/28/2017	SUPREME COURT ORDER received granting petition for writ of certiorari filed by Appellant Mr. Florencio Rosales-Mireles in 16-50151 on 09/28/2017. [8605050-1] [16-50151] (CAV)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

[Filed: October 6, 2015]

Criminal No. A15CR0297SS

UNITED STATES OF AMERICA,

Plaintiff,

v.

ROBERTO LOZANO-ALCAUTER
aka: FLORENCIO ROSALES-MIRELES,

Defendant.

INDICTMENT

[Violation: 8 U.S.C. § 1326
Illegal Re-entry into the United States.]

THE GRAND JURY CHARGES:

COUNT ONE
[8 U.S.C. § 1326]

On or about June 23, 2015, in the Western District of Texas, Defendant,

ROBERTO LOZANO-ALCAUTER
aka: FLORENCIO ROSALES-MIRELES,

an alien, was found in the United States, after having been denied admission, excluded, deported and removed therefrom on or about January 4, 2010, and the Defendant had not obtained consent to reapply for

admission from the Attorney General of the United States or his successor, the Secretary of Homeland Security; all in violation of Title 8, United States Code, Section 1326.

A TRUE BILL:

SIGNATURE REDACTED PURSUANT
TO E-GOVERNMENT ACT OF 2002

RICHARD L. DURBIN, JR.
UNITED STATES ATTORNEY

BY: /s/ Anthony W. Brown
Anthony W. Brown
Assistant U.S. Attorney

[1] UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Docket No. A 15-CR-297(1) SS

UNITED STATES OF AMERICA

vs.

FLORENCIO ROSALES-MIRELES

Austin, Texas
February 16, 2016

TRANSCRIPT OF SENTENCING BEFORE THE
HONORABLE SAM SPARKS

APPEARANCES:

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Interpreter:

Mr. Peter Heide

Court Reporter:

Ms. Lily Iva Reznik, CRR, RMR
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Austin, Texas 78701
(512) 391-8792

Proceedings reported by computerized stenography, transcript produced by computer.

[2] THE COURT: A 15-CR-297, *United States vs. Roberto Lozano-Alcauter*.

MS. COTTINGHAM: Elizabeth Cottingham for the United States.

MR. PETERSON: Good afternoon, your Honor.

David Peterson. And at the change of plea hearing, he had entered his true name as Florencio Rosales-Mireles. It's noted as such –

THE COURT: Yeah. It's A/K/A.

MR. PETERSON: Yes.

THE COURT: That's what happens when you have as many names as he has, many birth dates, false Social Security numbers, and whatnot.

Okay. If you'll tell me your full name and birth date.

THE DEFENDANT: Florencio Rosales-Mireles.

THE COURT: And your birth date?

THE DEFENDANT: xx-xx-64.

THE COURT: Mr. Rosales, have you had the opportunity to sit down with Mr. Peterson and review the presentence investigation made in your case?

THE DEFENDANT: Yes, sir.

THE COURT: The United States probation officer has calculated a sentencing guidelines for you of 77 to 96 months, with the information that you're 51 years of age. You're a Mexican citizen. You've been formally removed on one occasion [3] and apprehended on another. You've used multiple names, as illustrated by the fact the government doesn't even know your name when they indicted you. You have used at least two birth dates. You have five false Social Security numbers.

You came to us in federal custody on September 24, 2015, after being arrested at Travis County for assault/family violence, apparently the same day you went to the federal custody. You were convicted in 1999 of DWI, 2002 for assault, 2003 illegal entry, 2007 tampering with a government record and attempted fraudulent possession of an identification, 2009 aggravated assault with serious bodily injury where you stabbed a man multiply, an assault/family violence, and 2015 assault/family violence still with your wife, multiply.

So you've been assaulting Maria Perez since 2002. You have three other cases that were considered in the sentencing on those, and two other cases that were dismissed or otherwise disposed of.

You have advised the probation officer that you have good work record in landscaping and construction. There's no verification of that. I have no objections from the government. Only one objection and that is that in ten months, the guideline range of 2L.2 will – which has been proposed will be accepted, which would drop the guideline range from 41 to 51 months. I assume that's more of a 4A1.3 argument than it is –

MR. PETERSON: That's not an objection, your Honor. [4] That's just part of the motion for a non-guideline sentence.

THE COURT: And I have – that's it. So you can make your – I did get and review the motion for non-guideline sentence.

So, Mr. Rosales, before I sentence you, you have the right to say anything. I'll be glad to listen to anything that you would like to say.

THE DEFENDANT: My wife told me barely two weeks ago that I needed letters for my employment. But I ask you for mercy. For my children, my daughters, they're little. They're from – they're 19, 15, 14 years old.

THE INTERPRETER: Interpreter correction. Nine, 13, 14 years old.

THE COURT: Well, I've got them 14, 12, 11 and nine with two adult children.

THE DEFENDANT: Yes, sir.

The mercy I ask for is that I apologize – I'm sorry for what I've done. And my wife and I have plans now to go to Monterrey, where my mom is, my sister, my whole family. And I have work, once I get there, because my wife is diabetic and she cannot do hard work. And so, I need to work to be able to help my family.

THE COURT: Well, why do you beat her up every so often? You beat her up and were arrested for it because she had injuries in 2002 and 2009 and 2015. Every so often, you beat her [5] up where the police come and get you, like it did before you got to us.

THE DEFENDANT: I'm really sorry. I'm very remorseful for everything.

THE COURT: Okay.

THE DEFENDANT: What I want the most is not to come back here anymore to this wonderful country. My mom is also 80 years old and she's a little bit ill. I just want to go there to work and help my family.

MR. PETERSON: Judge, as I – well, I guess I'll start with the letters that were submitted along with the – my motion and memorandum. His family confirms that he is hard-working and supportive in that way, and has been, I think, for a long time. He is needed by his family, and he does take that type of responsibility and always has. I think you're right, that there's been these problems separated by about six, seven years each time.

Nonetheless, I think you and Ms. Cottingham and I have seen a lot of folks who end up with that level plus-16 in Criminal History Category VI. And Mr. Rosales has one single felony. Although it didn't result in a conviction until 2009, it's from 2001. So his only felony is 15 years old now. Now, in 2001, he didn't show up to court, but why in 2003 and 2007, they didn't bring him before the Court for this outstanding warrant, I don't know. But the fact remains the conduct from that plus-16 [6] offense is from 2001.

He's had – I looked back over it this morning – run-ins over the years. They have been separated by periods of years before this time in 2015. He had not been in any trouble since 2009, when he had finally been brought to – sentenced for that 2001 case. He's – I was pleasantly surprised by those letters that they're thinking – his family's thinking very specifically about how and what he will do in Mexico, rather than come

back, because that's the most notably perhaps for someone in his situation a grounds – kind of a commonsense grounds, but also one that's under 3553(a). He doesn't have a long series of deportations and apprehensions. He's been formally removed one –

THE COURT: He's got 13 criminal history points. That doesn't even take into consideration this alleged crime of violence 16.

MR. PETERSON: He does have that. He ended up in Criminal History Category VI through his own actions. If you count, though, it's two, four, and then, the seven, eight of those – no. Nine of those 13 points are from conduct that was in 2001 or 2002. Now, it's on him that he didn't end up in front of the Court until much later than that, but the vast bulk of that is significantly old and wouldn't have counted, to be fair, if he had just gone to court at the right time.

But a lot of his old conduct is catching up with him. [7] It's his first 1326, Judge. And you and I will have plenty of chance to talk about the commission and their new guidelines and all their proposals, but I think this is the type of thing where when a 15-year-old conviction is moving someone's range up so high – or a conviction for 15-year-old conduct is moving someone's range up so high, this is one of the cases where I think even the commission is acknowledging that the guidelines don't make it right. We're not asking for down to, you know, obviously time served, or even a year, or two years. But we are asking that you consider that 41 to 51 guideline range.

THE COURT: Well, the 2001, he didn't go, and so, at the same time, that same year that he had that was the second assault where he got six months.

MR. PETERSON: That's correct.

THE COURT: And then, of course, this last one, 200 days. So that was a serious one, too.

Okay. What says the government?

MS. COTTINGHAM: I think what's most disturbing to the government is when a defendant comes up here and uses his family saying that he wants mercy because of his family.

THE COURT: And his mother and his wonderful family.

MS. COTTINGHAM: And he's abused that very family. As the Court has already drawn attention to, he has four different assaults on his record. One in which he stabbed male individuals apparently. The other three in which he was beating up his wife. [8] Now, I can't think of something that's much more harmful to children than to see their own mother being beaten up by their father. I can't think of something that would be much more both emotionally and physically wrenching for a woman than being beaten up by her husband.

In the most recent assault, he apparently started beating up on his son first. So now, it's not just the mother but he's beating up on the son, and when the mother intervenes, his wife, he punches her three times with a closed fist in the face. I mean, that's his most recent conduct that we can look at to see whether someone has changed with him.

That's what causes me concern is when you do violence to other people and the fact that you would do violence to your own family is obviously especially harmful.

PROBATION OFFICER: Nothing.

THE COURT: Anybody wish to speak at this sentencing?

Mr. Rosales, Mr. Peterson, anything further?

MR. PETERSON: Nothing further, your Honor.

THE COURT: Florencio Rosales-Mireles, also known as Roberto Lozano-Alcauter, and other names, I sentence you to a term in the penitentiary of 78 months, followed by a three-year term of supervised release. I put the conditions of 18 United States Code 3583 on that supervised release, which means, as you know, Mr. Rosales, if you attempt to come back here illegally and are found here illegally, you can be sentenced in this case [9] again, as well as the next felony case of illegal reentry, and you'll receive double sentences.

So I hope your representations that you're not coming back and you're going to be in Monterrey are true. You don't do us any good to put you in jail. Certainly doesn't do your family any good, either.

I'll let the record reflect that under the consideration 4A1.3, when I look at the elements, I would have not sentenced Mr. Rosales to anything less than the 78 months after he's – his conduct in these cases and his conduct here today.

There will be no fine in the case, but I do impose the $100 assessment under the Victims of Crime Act, which you must pay or work off at his earliest opportunity.

I'm going to seal the presentence investigation. Nobody could come in and read about your conduct, Mr. Rosales, which is probably a blessing. And I'm giving you – in the event of any appeal, it becomes part of the record, and the government may use their

copies. And I will enter an order substantiating the reasons for the 78 months.

Primarily, it is when I consider the nature and the circumstance of the offense, this is the second time he's come to the courts for being here illegally. He's attempted to hide in the United States with multiple aliases, birth dates, Social Security numbers. His assaultive behavior, as counsel indicates, [10] at least dates from 2001 to 2015.

So the history and characteristics of the defendant are no better than the nature and circumstance of the offense. It's a serious offense, of course. And promote respect for the law, we're a country of laws. We must enforce our laws. And just punishment for his offense with his background, I think, is adequate. And hopefully this will keep Mr. Rosales from not returning to the United States to commit criminal conduct. And it's obvious he is a threat to the public by his assaultive conduct.

Anything further, counsel?

MR. PETERSON: No, your Honor.

THE COURT: I'll remand the defendant.

(End of proceedings.)

[11] UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS

I, LILY I. REZNIK, Official Court Reporter, United States District Court, Western District of Texas, do certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

I certify that the transcript fees and format comply with those prescribed by the Court and Judicial Conference of the United States.

WITNESS MY OFFICIAL HAND this the 21st day of March, 2016

/s/ Lily I. Reznik

LILY I. REZNIK, CRR, RMR
Official Court Reporter
United States District Court
Austin Division
501 W. 5th Street, Suite 4153
Austin, Texas 78701
(512) 391-8792
Certification No. 4481
Expires: 12-31-16

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

[Filed: February 16, 2016]

Case Number: AU:15-CR-00297(1)-SS
USM Number: 31287-180

UNITED STATES OF AMERICA

v.

ROBERTO LOZANO-ALCAUTER a/k/a
FLORENCIO ROSALES-MIRELES
True Name: Florencio Rosales-Mireles,
Aliases: Emilio Moreno Ruiz, Florencio Mireles Rosales, Juan Antonio Najera, Roberto Alcauter-Lozano, Emilio Ruiz, Florencio Mireles, Florencio Rosales-Mireles, Florencio Rosales, Emilio Romero Ruiz, Florencio Rosales-Moreles, and Roberto Luis Elizondo

Defendant.

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant, FLORENCIO ROSALES-MIRELES, was represented by David M.C. Peterson.

The defendant pled guilty to Count 1 of the Indictment on November 18, 2015. Accordingly, the defendant is adjudged guilty of such Count, involving the following offense:

Title & Section	Nature of Offense	Offense Ended	Count
8 U.S.C. § 1326(a) and 8 U.S.C. § 1326(b)(2)	Illegal Re-Entry into the United States	06/23/2015	1

As pronounced on February 16, 2016, the defendant is sentenced as provided in pages 2 through 6 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the Court and United States Attorney of material changes in economic circumstances.

Signed this 16th day of February, 2016.

/s/ Sam Sparks
SAM SPARKS
United States District Judge

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **SEVENTY-EIGHT (78) MONTHS.**

The defendant shall remain in custody pending service of sentence.

RETURN

I have executed this judgment as follows: _____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____

UNITED STATES MARSHAL

_____

By DEPUTY UNITED STATES MARSHAL

NON-REPORTING SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on non-reporting supervised release for a term of **THREE (3) YEARS.**

While on supervised release, the defendant shall comply with the mandatory, standard and if applicable, the special conditions that have been adopted by this Court, and shall comply with the following additional conditions:

X If defendant is excluded, deported or removed upon release of probation or supervised release, the term of supervision shall be a non-reporting term of probation or supervised release. The defendant shall not illegally reenter the United States. If the defendant lawfully reenters the United States during the term of probation or supervised release, the defendant shall immediately report in person to the nearest U.S. Probation Office.

CONDITIONS OF SUPERVISION

Mandatory Conditions:

1) The defendant shall not commit another federal, state, or local crime during the term of supervision.

2) The defendant shall not unlawfully possess a controlled substance.

3) The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release on probation or supervised release and at least two periodic drug tests thereafter (as determined by the court) for use of a controlled substance, but the condition stated in this paragraph may be ameliorated or suspended by the court if the defendant's presentence report or other reliable sentencing information indicates low risk of future substance abuse by the defendant.

4) In supervised release cases only, the defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from custody of the Bureau of Prisons.

5) If convicted of a felony, the defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

6) The defendant shall cooperate in the collection of DNA as directed by the probation officer, if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. § 14135a).

7) If convicted of a sexual offense and required to register under the Sex Offender and Registration Act,

that the defendant comply with the requirements of the Act.

8) If convicted of a domestic violence crime as defined in 18 U.S.C. § 3561(b), the defendant shall participate in an approved program for domestic violence.

9) If the judgment imposes a fine or restitution, it is a condition of supervision that the defendant pays in accordance with the Schedule of Payments sheet of the judgment.

Standard Conditions:

1) The defendant shall not leave the judicial district without permission of the court or probation officer.

2) The defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer.

3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.

4) The defendant shall support his or her dependents and meet other family obligations, and shall comply with the terms of any court order or order of an administrative process requiring payments by the defendant for the support and maintenance of a child or of a child and the parent with whom the child is living.

5) The defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons.

6) The defendant shall notify the probation officer at least ten days prior to any change in residence or employment.

7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician.

8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.

9) The defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer.

10) The defendant shall permit a probation officer to visit him or her at any time, at home or elsewhere, and shall permit confiscation of any contraband observed in plain view of the probation officer.

11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.

13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications, and to confirm the defendant's compliance with such notification requirement.

14) If convicted of a sex offense as described in the Sex Offender Registration and Notification Act or has a prior conviction of a State or local offense that would

have been an offense as described in the Sex Offender Registration and Notification Act if a circumstance giving rise to federal jurisdiction had existed, the defendant shall participate in a sex offender treatment program approved by the probation officer. The defendant shall abide by all program rules, requirements and conditions of the sex offender treatment program, including submission to polygraph testing, to determine if the defendant is in compliance with the conditions of release. The defendant may be required to contribute to the cost of the services rendered (copayment) in an amount to be determined by the probation officer, based on the defendant's ability to pay.

15) The defendant shall submit to an evaluation for substance abuse or dependency treatment as directed by the probation officer, and if deemed necessary by the probation officer, the defendant shall participate in a program approved by the probation officer for treatment of narcotic addiction or drug or alcohol dependency which may include testing and examination to determine if the defendant has reverted to the use of drugs or alcohol. During treatment, the defendant shall abstain from the use of alcohol and any and all intoxicants. The defendant may be required to contribute to the cost of the services rendered (copayment) in an amount to be determined by the probation officer, based upon the defendant's ability to pay.

16) The defendant shall submit to an evaluation for mental health counseling as directed by the probation officer, and if deemed necessary by the probation officer, the defendant shall participate in a mental health program approved by the probation officer. The defendant may be required to contribute to the cost of

the services rendered (copayment) in an amount to be determined by the probation officer, based upon the defendant's ability to pay.

17) The defendant shall participate in a cognitive behavioral treatment program as directed by the probation officer, and if deemed necessary by the probation officer. Such program may include group sessions led by a counselor or participation in a program administered by the probation office. The defendant may be required to contribute to the cost of the services rendered (copayment) in an amount to be determined by the probation officer, based upon the defendant's ability to pay.

18) The defendant shall participate in workforce development programs and services as directed by the probation officer, and if deemed necessary by the probation officer, which include occupational/career development, including but not limited to assessment and testing, education, instruction, training classes, career guidance, job search and retention services until successfully discharged from the program. The defendant may be required to contribute to the cost of the services rendered (copayment) in an amount to be determined by the probation officer, based upon the defendant's ability to pay.

19) If the defendant is excluded, deported, or removed upon release on probation or supervised release, the term of supervision shall be a non-reporting term of probation or supervised release. The defendant shall not illegally reenter the United States. If the defendant lawfully reenters the United States during the term of probation or supervised release, the defendant shall immediately report in person to the nearest U.S. Probation Office.

20) If the judgment imposes other criminal monetary penalties, it is a condition of supervision that the defendant pays such penalties in accordance with the Schedule of Payments sheet of the judgment.

21) If the judgment imposes a fine, special assessment, restitution, or other criminal monetary penalties, it is a condition of supervision that the defendant shall provide the probation officer access to any requested financial information.

22) If the judgment imposes a fine, special assessment, restitution, or other criminal monetary penalties, it is a condition of supervision that the defendant shall not incur any new credit charges or open additional lines of credit without the approval of the probation officer, unless the defendant is in compliance with the payment schedule.

CRIMINAL MONETARY PENALTIES/SCHEDULE

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth. Unless the Court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. Criminal Monetary Penalties, except those payments made through Federal Bureau of Prisons' Inmate Financial Responsibility Program shall be paid through the Clerk, United States District Court, 501 West Fifth Street, Suite 1100, Austin, TX 78701. The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

	Assessment	Fine	Restitution
TOTALS	$100.00	$.00	$.00

SPECIAL ASSESSMENT

It is ordered that the defendant shall pay to the United States a special assessment of $100.00. Payment of this sum shall begin immediately.

FINE

The fine is waived because of the defendant's inability to pay.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column above. However, pursuant to 18 U.S.C. § 3664(i), all non-federal victims must be paid before the United States is paid.

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. §3614.

The defendant shall pay interest on any fine or restitution of more than $2,500.00, unless the fine or restitution is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. §3612(f). All payment options may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. §3812(g).

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest, (7) penalties, and (8) costs, including cost of prosecution and court costs.

Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed: March 6, 2017]

No. 16-50151

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

FLORENCIO ROSALES-MIRELES,
Also Known as Roberto Lozano-Alcauter,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas

Before SMITH, CLEMENT, and SOUTHWICK, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

Florencio Rosales-Mireles appeals his sentence for illegal reentry. He contends that the district court erred by counting one of his prior convictions twice when calculating the sentencing-guideline range. He also maintains that the sentence is substantively unreasonable. Finding no reversible error, we affirm.

I.

Rosales-Mireles pleaded guilty of illegal reentry in violation of 8 U.S.C. § 1326(a) and (b)(2). When calculating the criminal-history score, the probation officer counted a 2009 Texas conviction of misde-

meanor assault twice, assessing two criminal-history points each time it was counted. The total criminal-history score was calculated as 13, resulting in a criminal-history category of VI. Combined with Rosales-Mireles's offense level of 21, that criminal-history category yielded a guideline range of 77-96 months.

Rosales-Mireles did not object to the double-counting but did request a downward departure to 41 months. The district court denied the departure and sentenced Rosales-Mireles to 78 months of imprisonment and a three-year term of supervised release. Rosales-Mireles did not object to the sentence after it was imposed.

II.

Rosales-Mireles assigns error to the double-counting. He concedes that he did not make that objection in district court, so we apply the plain-error standard. *See United States v. Peltier*, 505 F.3d 389, 391 (5th Cir. 2007). To establish plain error, Rosales-Mireles must show (1) an error; (2) that was clear or obvious; and (3) that affected his substantial rights. *Puckett v. United States*, 556 U.S. 129, 135 (2009). "[I]f the above three prongs are satisfied, [we have] the *discretion* to remedy the error—discretion which ought to be exercised only if the error seriously affects the fairness, integrity or public reputation of judicial proceedings." *Id.* (quotation marks and alterations omitted).

A.

The government concedes that the double-counting is error, and we agree. The sentencing guidelines provide that two criminal-history points be added "for *each* prior sentence of imprisonment of at least sixty days . . . ." U.S. Sentencing Guidelines Manual ("U.S.S.G.") § 4A1.1 (emphasis added). By adding four

points based on the same conviction, the court erred. Moreover, "the error is clear from the language of the Guidelines."[1] Thus, Rosales-Mireles satisfies the first two prongs.

B.

To satisfy the third prong, Rosales-Mireles must show "a reasonable probability that, but for the district court's misapplication of the Guidelines, he would have received a lesser sentence."[2] "When a defendant is sentenced under an incorrect Guidelines range . . . the error itself can, and most often will, be sufficient to show a reasonable probability of a different outcome absent the error." *Molina-Martinez*, 136 S. Ct. at 1345. But "[t]he Government remains free to point to parts of the record—including relevant statements by the judge—to counter any ostensible showing of prejudice the defendant may make." *Id.* at 1347 (quotation marks omitted and alteration adopted).

Had the district court not erred by double-counting Rosales-Mireles's misdemeanor-assault conviction, the guideline range would have been 70-87 months instead of 77-96 months as recommended in the presentence report. Nonetheless, the government contends that the court would have sentenced Rosales-Mireles to the same term of imprisonment even if it

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[1] *United States v. Espinoza*, 677 F.3d 730, 736 (5th Cir. 2012). *See also United States v. Blocker*, 612 F.3d 413, 416 (5th Cir. 2010), *abrogated on other grounds by Molina-Martinez v. United States*, 136 S. Ct. 1338 (2016) ("As our conclusion is reached by a straightforward application of the guidelines, the error was also plain.").

[2] *United States v. Martinez-Rodriguez*, 821 F.3d 659, 663-64 (5th Cir. 2016) (quoting *United States v. Pratt*, 728 F.3d 463, 481 (5th Cir. 2013) (citation omitted)).

had not erred by double-counting. The government notes that the district court stated that it "would have not sentenced [Rosales-Mireles] to anything less than the 78 months."

But that statement, in context, does not go quite so far as saying that the court would have sentenced Rosales-Mireles to 78 months regardless of the guideline recommendation. The full statement is this: "I'll let the record reflect that under the consideration 4A1.3, when I look at the elements, I would have not sentenced Mr. Rosales to anything less than the 78 months after he's—his conduct in these cases and his conduct here today."

The explanation was made in the context of denying a downward departure under U.S.S.G. § 4A1.3. Moreover, the denial was based, in part, on Rosales-Mireles's criminal history, and that history—because of the double-counting—erroneously included an extra conviction. Thus, we cannot say that the district court "explicitly and unequivocally indicate[d] that [it] would have imposed the same sentence . . . irrespective of the Guidelines range."[3] Rosales-Mireles has met his burden, under the third prong, to show a reasonable probability that he would have been subject to a different sentence but for the error.

C.

Even though Rosales-Mireles has satisfied the first three prongs, we must decide whether to exercise our discretion to remedy the error. We do so only where "the error seriously affect[s] the fairness, integrity or

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[3] *United States v. Miller*, 657 F. App'x 265, 270 (5th Cir. 2016) (per curiam). *See also United States v. Mudekunye*, 646 F.3d 281, 290 (5th Cir. 2011) (per curiam).

public reputation of judicial proceedings."[4] "The fourth prong . . . is not satisfied simply because the 'plainly' erroneous sentencing guideline range yields a longer sentence than the range that, on appeal, we perceive as correct." *United States v. Sarabia-Martinez*, 779 F.3d 274, 278 (5th Cir. 2015).[5] Rather, "[t]he types of errors that warrant reversal are ones that would shock the conscience of the common man, serve as a powerful indictment against our system of justice, or seriously call into question the competence or integrity of the district judge." *United States v. Segura*, 747 F.3d 323, 331 (5th Cir. 2014) (quotation marks omitted).[6]

We decline to exercise our discretion in this case. We sometimes exercise discretion to correct a plain error where the imposed sentence is "materially or substantially above the properly calculated range." *United States v. John*, 597 F.3d 263, 289 (5th Cir. 2010).[7] But

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[4] *United States v. Escalante-Reyes*, 689 F.3d 415, 419 (5th Cir. 2012) (en banc) (quoting *Puckett*, 556 U.S. at 135 (alteration in original)).

[5] *See also United States v. Wooley*, 740 F.3d 359, 369 (5th Cir. 2014) ("This circuit has repeatedly emphasized that even when we find that the first three factors have been established, this fourth factor is not automatically satisfied.") (quotation marks omitted); *United States v. Ellis*, 564 F.3d, 370, 378 (5th Cir. 2009) ("Not every error that increases a sentence need be corrected by a call upon plain error doctrine.").

[6] *Accord United States v. Mendoza-Velasquez*, 847 F.3d 209, 213 (5th Cir. 2017) (per curiam) (citing *United States v. Scott*, 821 F.3d 562, 571 (5th Cir. 2016)).

[7] *See, e.g.*, *John*, 597 F.3d at 285-86 (exercising discretion to correct a sentence 21 months outside the correct range); *United States v. Hernandez*, 690 F.3d 613, 621-22 (5th Cir. 2012) (exercising discretion to correct a sentence 12 months outside the correct range); *Mudekunye*, 646 F.3d at 290-91 (exercising discretion to correct a sentence 19 months outside the correct range).

we also have declined to use that discretion even where the discrepancy was huge.[8] Where the difference between the imposed sentence and the properly calculated range is small, we generally decline to correct the error.[9]

Here, there is *no* discrepancy between the sentence and the correctly calculated range. The court sentenced Rosales-Mireles to 78 months, which is in the middle of the proper range of 70-87 months. We cannot say that the error or resulting sentence would shock the conscience. Thus, we elect not to exercise our discretion.

III.

Rosales-Mireles contends that his sentence is substantively unreasonable because it is greater than necessary to effect the goals of 18 U.S.C. § 3553(a). Rosales-Mireles did not object to reasonableness in the district court, so we review only for plain error.[10]

A within-guidelines sentence is entitled to a presumption of reasonableness, and "[t]he presumption is

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[8] In *United States v. Wikkerink*, 841 F.3d 327, 337 (5th Cir. 2016), we declined relief under the fourth prong despite that the "correct sentence according to the Guidelines would have been 180 months [but] the district court ultimately imposed a sentence of 360 months."

[9] *See, e.g.*, *United States v. Avalos-Martinez*, 700 F.3d 148, 154 (5th Cir. 2012) (per curiam) (declining to exercise discretion where the imposed sentence exceeded the correct range by only one month); *United States v. Emanuel-Fuentes*, 639 F. App'x 974, 977 (5th Cir. 2015) (per curiam) (same).

[10] Rosales-Mireles notes that "[t]here is a circuit split as to whether a failure to object to the reasonableness of the sentence upon its imposition requires plain error review." He acknowledges that his argument is foreclosed, *see Peltier*, 505 F.3d at 391-92, and he raises it only to preserve it for further review.

rebutted only upon a showing that the sentence does not account for a factor that should receive significant weight, it gives significant weight to an irrelevant or improper factor, or it represents a clear error of judgment in balancing sentencing factors." *United States v. Cooks*, 589 F.3d 173, 186 (5th Cir. 2009). Rosales-Mireles's 78-month sentence is within-guidelines, as it is within the overlap of the correct (70-87 months) and incorrect (77-96 months) ranges. It is therefore presumed reasonable. *Id.*

Rosales-Mireles has not rebutted the presumption. He maintains that the district court placed too much weight on his old, prior convictions. But the court considered that argument during sentencing and rejected it. The court explicitly considered a number of the § 3553(a) factors, including the nature of the offense; Rosales-Mireles's history and characteristics; and the need to protect the public, deter future criminal conduct, and promote respect for the law. In addition, the court noted that this was Rosales-Mireles's second conviction for being in the United States illegally, that he had used multiple aliases to remain in the United States, and that he had a history of assault stretching from 2001 to 2015.

The district court was in the best position to evaluate Rosales-Mireles's history and characteristics and the need for the sentence to further the objectives in § 3553(a). *See Gall v. United States*, 552 U.S. 38, 51-52 (2007). Accordingly, the decision is entitled to deference. *Id.* Rosales-Mireles has not rebutted the presumption of reasonableness.

The judgment of sentence is AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed: March 6, 2017]

No. 16-50151
D.C. Docket No. 1:15-CR-297-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

FLORENCIO ROSALES-MIRELES, also known as Roberto Lozano-Alcauter,

Defendant-Appellant

Appeal from the United States District Court
for the Western District of Texas, Austin

JUDGMENT

Before SMITH, CLEMENT, and SOUTHWICK, Circuit Judges.

This cause was considered on the record on appeal and the briefs on file.

It is ordered and adjudged that the sentence imposed by the District Court is affirmed.

(ORDER LIST: 582 U.S.)

THURSDAY, SEPTEMBER 28, 2017

CERTIORARI GRANTED

* * *

16-9493 ROSALES-MIRELES, FLORENCIO V. UNITED STATES

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted.

No. 16-9493

IN THE

Supreme Court of the United States

FLORENCIO ROSALES-MIRELES,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF PETITIONER

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QUESTION PRESENTED

In *United States* v. *Olano*, this Court held that, under the fourth prong of plain error review, "[t]he Court of Appeals should correct a plain forfeited error affecting substantial rights if the error 'seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.'" 507 U.S. 725, 736 (1993). To meet that standard, is it necessary, as the United States Court of Appeals for the Fifth Circuit required, that the error be one that "would shock the conscience of the common man, serve as a powerful indictment against our system of justice, or seriously call into question the competence or integrity of the district judge?"

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINION BELOW	1
JURISDICTION	1
RULE INVOLVED	1
INTRODUCTION	1
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	5
ARGUMENT	8
I. IN THE ORDINARY CASE, A GUIDELINES MISCALCULATION SATISFIES THE FOURTH PRONG OF THE *OLANO* STANDARD FOR PLAIN ERROR REVIEW	9
A. Certain Kinds Of Plain Errors, Like A Miscalculated Sentencing Guidelines Range, Ordinarily Should Be Corrected	9
B. Correcting Guidelines Errors In The Ordinary Case Still Leaves Room For Countervailing Factors In Particular Cases	17
II. THE FIFTH CIRCUIT'S SHOCK-THE-CONSCIENCE STANDARD IS IRRECONICILABLE WITH THIS COURT'S PRECEDENTS AND IMPOSES AN IMPROPER BURDEN ON CRIMINAL DEFENDANTS	18

TABLE OF CONTENTS—continued

Page

A. The Fifth Circuit's Standard Is Unduly Harsh And Has No Place In Plain Error Review 19

B. The Fifth Circuit's Standard Is Especially Misguided In The Unique Context Of Guidelines Errors 22

CONCLUSION 24

TABLE OF AUTHORITIES

CASES Page

Argersinger v. *Hamlin*, 407 U.S. 25 (1972) (Burger, C.J., concurring) 11
Baldwin v. *New York*, 399 U.S. 66 (1970) 11
Barber v. *Thomas*, 130 S. Ct. 2499 (2010) (Kennedy, J., dissenting) 11
Brasfield v. *United States* 272 U.S. 448 (1926) 10
Breithaupt v. *Abram*, 352 U.S. 432 (1957) 20
Cty. of Sacramento v. *Lewis*, 523 U.S. 833 (1998) 7, 8, 19, 20
Daniels v. Williams, 474 U.S. 327 (1986) 19, 20
Foucha v. *Louisiana*, 504 U.S. 71 (1992) 11
Gall v. *United States*, 552 U.S. 38 (2007) 6, 12
Glover v. *United States*, 531 U.S. 198 (2001) 11, 22
Henderson v. *United States*, 568 U.S. 266 (2013) 21
Hicks v. *United States*, 137 S. Ct. 2000 (2017) (Gorsuch, J., concurring) 1, 2, 3, 10, 11
Johnson v. *United States*, 520 U.S. 461 (1997) 9, 10
Molina-Martinez v. *United States*, 136 S. Ct. 1338 (2016) ..... *passim*
Peugh v. *United States*, 133 S. Ct. 2072 (2013) 12
Puckett v. *United States*, 556 U.S. 129 (2009) 7, 10, 17

TABLE OF AUTHORITIES—continued

Page

Rita v. *United States*, 551 U.S. 338 (2007) 14, 15, 22
Rochin v. *California*, 342 U.S. 165 (1952) 19, 20
United States v. *Booker*, 543 U.S. 220 (2005) 12
United States v. *Castillo-Casiano*, 198 F.3d 787 (9th Cir. 1999) 13, 15
United States v. *Corso*, 549 F.3d 921 (3d Cir. 2008) 17
United States v. *Dahl*, 833 F.3d 345 (3d Cir. 2016) 16
United States v. *Escalante-Reyes*, 689 F.3d 415 (5th Cir. 2012) (en banc) (Smith, J., dissenting) 20
United States v. *Figueroa-Ocasio*, 805 F.3d 360 (1st Cir. 2015) 16
United States v. *Frady*, 456 U.S. 152 (1982) 19
United States v. *Jaimes-Jaimes*, 406 F.3d 845 (7th Cir. 2005) 21
United States v. *Langford*, 516 F.3d 205 (3d Cir. 2008) 14
United States v. *Martinez-Rios*, 143 F.3d 662 (2d Cir. 1998) 11
United States v. *Olano*, 507 U.S. 725 (1993) ..... *passim*
United States v. *Pennington*, 667 F.3d 953 (7th Cir. 2012) 11
United States v. *Rushton*, 738 F.3d 854 (7th Cir. 2013) 22
United States v. *Sabillon-Umana*, 772 F.3d 1328 (10th Cir. 2014) 15, 16

TABLE OF AUTHORITIES—continued

Page

United States v. *Syme*, 276 F.3d 131 (3d Cir. 2002) 16
United States v. *Wernick*, 691 F.3d 108 (2d Cir. 2012) 16, 17
United States v. *Westover*, 435 F.3d 1273 (10th Cir. 2006) 18
Wall v. *Kholi*, 562 U.S. 545 (2011) 9
Williams v. *Pennsylvania*, 136 S. Ct. 1899 (2016) 21
Williams v. *United States*, 503 U.S. 193 (1992) 22

STATUTES AND RULES

18 U.S.C. § 3552(a) 12
18 U.S.C. § 3553(a) 11, 12, 14
18 U.S.C. § 3742(f)(1) 16
28 U.S.C. § 991(b) 14
28 U.S.C. § 994 ..... 14, 15
Fed. R. Crim. P. 32(c) 12
Fed. R. Crim. P. 52(b) 1, 6

OTHER AUTHORITIES

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S. Rep. No. 98-225 (1983) 12, 13
Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1 (1988) 14

TABLE OF AUTHORITIES—continued

Page

William H. Pryor, Jr., *The Integral Role of Federal Probation Officers in the Guidelines System*, 81 Fed. Probation 13 (Sept. 2017) 13

United States Courts, *Incarceration Costs Significantly More Than Supervision* (Aug. 17, 2017), *available at* http://www.uscourts.gov/news/2017/08/17/incarceration-costs-significantly-more-supervision 15

U.S. Sentencing Commission, Sourcebook of Federal Sentencing Statistics (2016) 12

U.S. Sentencing Guidelines Manual (U.S. Sentencing Comm'n 2016) 3, 4, 14, 15

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reprinted at Joint Appendix (J.A.) 32–38 and is reported at 850 F.3d 246.

JURISDICTION

The court of appeals entered judgment on March 6, 2017. J.A. 39. The petition for a writ of certiorari was filed on June 5, 2017, and was granted on September 28, 2017. J.A. 40. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RULE INVOLVED

Federal Rule of Criminal Procedure 52(b) provides: "A plain error that affects substantial rights may be considered even though it was not brought to the court's attention."

INTRODUCTION

This Court has directed that the courts of appeals "should correct a plain forfeited error affecting substantial rights if the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *United States* v. *Olano*, 507 U.S. 725, 736 (1993). "In most cases," given that the "Sentencing Guidelines provide the framework for the tens of thousands of federal sentencing proceedings that occur each year," a showing that the district court "mistakenly deemed applicable an incorrect, higher Guidelines range" should "suffice for relief." *Molina-Martinez* v. *United States*, 136 S. Ct. 1338, 1342, 1346 (2016). That is because, most of the time, such "obvious judicial error[s]" will seriously affect the fairness, integrity, or public reputation of judicial proceedings by threatening to "allow[ ] individuals to linger longer

in prison than the law requires[.]" *Hicks* v. *United States*, 137 S. Ct. 2000, 2000–01 (2017) (Gorsuch, J., concurring).

Once again, however, "the Fifth Circuit stands generally apart from other Courts of Appeals with respect to its consideration of unpreserved Guidelines errors." *Molina-Martinez*, 136 S. Ct. at 1345. Applying a piecemeal standard assembled from inapposite areas of the law, the Fifth Circuit has declined to correct a plain Guidelines error unless it "shock[s] the conscience of the common man, serve[s] as a powerful indictment against our system of justice, or seriously call[s] into question the competence or integrity of the district judge." J.A. 36. The Fifth Circuit's strict rule is contrary to this Court's precedents and to the fundamental nature of Guidelines errors. More than that, the Fifth Circuit's test would effectively gut this Court's holding in *Molina-Martinez*. After defendants succeed on the first three prongs of plain error review, they would arrive at the fourth prong only to learn that their success on the other three was entirely for naught. Such a result would seriously thwart "the fairness, integrity, or public reputation of judicial proceedings."

This case is emblematic. Petitioner Florencio Rosales-Mireles received a 78-month sentence that was just one month above the erroneous 77-month Guidelines floor presented to the district court. The correct range started at 70 (not 77) months. The Fifth Circuit nevertheless refused to allow the district court to revisit its sentence or to decide whether it might impose a sentence of, say, 70 or 71 months, because the court of appeals was not convinced that "the error or resulting sentence would shock the conscience." J.A. 37. That is emphatically not the way to protect against "the possibility that [courts] might

permit the government to deny someone his liberty longer than the law permits only because [they] refuse to correct an obvious judicial error." *Hicks*, 137 S. Ct. at 2001 (Gorsuch, J., concurring). Because the Guidelines error below readily satisfies *Olano*'s fourth prong, the court of appeals should have corrected it. The Court should reverse.

STATEMENT OF THE CASE

Mr. Rosales-Mireles pleaded guilty to illegally reentering the United States in violation of 8 U.S.C. § 1326. In anticipation of sentencing, one of the district court's probation officers prepared a presentence report that included the officer's calculation of the imprisonment range recommended by the U.S. Sentencing Guidelines. According to the probation officer, Mr. Rosales-Mireles had 13 criminal history points, which placed him in Criminal History Category VI. J.A. 33. That Category combined with Mr. Rosales-Mireles's total offense level of 21 to produce a Guidelines range of 77 to 96 months of imprisonment. *Id.*

That range was wrong. The probation officer miscalculated Mr. Rosales-Mireles's Criminal History Category, which is determined by assessing points for prior convictions. See U.S. Sentencing Guidelines Manual § 4A1.1 (U.S. Sentencing Comm'n 2016) (USSG). Specifically, the probation officer counted one of Mr. Rosales-Mireles's prior convictions—a misdemeanor assault—as two separate convictions. J.A. 32–33. By counting the conviction twice, the probation officer assessed four criminal history points instead of two for the single conviction. See USSG § 4A1.1(b); J.A. 32–33. But for that error, the total number of criminal history points would have been 11, not 13, which would have placed Mr. Rosales-Mireles in Criminal History Category V, not VI. See

USSG Ch.5, Pt.A (Sentencing Table). The correct Guidelines range at Category V is 70 to 87 months of imprisonment, not 77 to 96 months. *Id.*

Everyone—Mr. Rosales-Mireles, the Government, and the district court—overlooked that obvious error in the presentence report. At sentencing, the district court rejected Mr. Rosales-Mireles's motion for a downward variance from the incorrect 77- to 96-month Guidelines range, adopted the presentence report without change, and sentenced Mr. Rosales-Mireles to 78 months of imprisonment. J.A. 19.

Mr. Rosales-Mireles appealed. He argued that the district court plainly erred in determining the applicable Guidelines range by counting a single conviction twice in his criminal history calculation. Mr. Rosales-Mireles contended that the error affected his substantial rights because the error produced a Guidelines range that was higher than he should have faced. Mr. Rosales-Mireles also argued that the court of appeals should correct the error because it seriously affected the fairness, integrity, and public reputation of the judicial proceedings.

The Government conceded that the district court had plainly erred in the Guidelines calculation, but opposed any relief for Mr. Rosales-Mireles. With respect to the fourth prong, the Government argued that the error did not warrant correction because Mr. Rosales-Mireles's sentence fell within both the correct and incorrect ranges. In addition, the Government argued, several extra months in prison was not a big deal: "the disparity between the sentence imposed—78 months—and the very bottom of the correctly-calculated Guideline range—70 months—is small[,]" and the difference between 71 months (one month above the bottom of the correct range) and 78 months was "just seven months." Brief for the United States

of America at 12 & n.2, *United States* v. *Rosales-Mireles*, No. 16-50151 (5th Cir. Aug. 4, 2016).

The court of appeals agreed that the district court plainly erred in calculating Mr. Rosales-Mireles's Guidelines range. J.A. 33–34. Relying on this Court's decision in *Molina-Martinez*, the court of appeals also held that the error affected Mr. Rosales-Mireles's substantial rights because it resulted in the use of an incorrect range, and because the district court's statements at sentencing did not clearly and explicitly indicate that it would have imposed the same sentence regardless of the range. *Id.* at 34–35.

Nevertheless, the court of appeals refused to correct the plain error. In the Fifth Circuit's view, "[t]he types of errors that warrant reversal are ones that would shock the conscience of the common man, serve as a powerful indictment against our system of justice, or seriously call into question the competence or integrity of the district judge." J.A. 36. Because Mr. Rosales-Mireles's 78-month sentence was "in the middle of the proper range of 70–87 months[,]" the Fifth Circuit could not "say that the error or resulting sentence would shock the conscience." *Id.* at 37. The court therefore "elect[ed] not to exercise [its] discretion." *Id.*

This Court granted certiorari to consider whether the Fifth Circuit applied the wrong fourth-prong standard.

SUMMARY OF ARGUMENT

Mr. Rosales-Mireles was—without question—sentenced under an erroneously high Guidelines range. Because of that indisputably plain error Mr. Rosales-Mireles's case should have been sent back to

the district court for resentencing. See Fed. R. Crim. P. 52(b).

I. The fourth-prong standard for plain error review is well-established: the inquiry that "should guide the exercise of remedial discretion" is whether "the error seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Olano*, 507 U.S. at 736.

A Sentencing Guidelines miscalculation that leads to application of an incorrect, higher Guidelines range ordinarily satisfies that standard. The Guidelines "are complex, and so there will be instances when a district court's sentencing of a defendant within the framework of an incorrect Guidelines range goes unnoticed." *Molina-Martinez*, 136 S. Ct. at 1342–43. When that happens, courts of appeals typically should exercise their discretion to correct the forfeited error. *Olano*, 507 U.S. at 736.

That result follows from the Guidelines' fundamental role in determining criminal sentences and their concomitant role in helping to protect against defendants spending unnecessary time in prison. The Guidelines are both "the starting point" for any sentence, *Gall* v. *United States*, 552 U.S. 38, 49 (2007), and "the lodestar," *Molina-Martinez*, 136 S. Ct. at 1346. District judges clearly follow those guideposts, as almost every sentence imposed nationwide falls within or below the Guidelines range. As this Court recently summarized, the Guidelines' "systemic function" and "[e]ffect [on] the sentence" in "the usual case" is "essential to the application of Rule 52(b) to a Guidelines error." *Molina-Martinez*, 136 S. Ct. at 1346.

The Court should therefore recognize that Guidelines errors ordinarily satisfy *Olano*'s fourth prong.

This conclusion is consistent with this Court's precedent, is the near-unanimous view of the courts of appeals, and guarantees the fairness, integrity, and public reputation of judicial proceedings system-wide. What is more, the conclusion allows district judges to exercise their sentencing discretion under the correct range in the first instance, promotes the uniformity and proportionality goals underlying the Guidelines, and is a relatively low-cost solution that does not require anything like a complete retrial. Such benefits should be encouraged.

Finally, this approach preserves the discretion inherent in the fourth prong while accounting for the Guidelines' unique status in judicial proceedings. The courts of appeals still retain discretion to identify "countervailing factors" that weigh against relief "on a case-specific and fact-intensive basis." *Puckett* v. *United States*, 556 U.S. 129, 142–43 (2009). But those factors should be the exception rather than the rule.

II. The standard the Fifth Circuit invoked to deny relief to Mr. Rosales-Mireles is irreconcilable with these principles. In its own, unique gloss on *Olano*'s fourth prong, the Fifth Circuit has held that the court of appeals should deny relief under the fourth prong unless the error at issue "shock[s] the conscience of the common man, serve[s] as a powerful indictment against our system of justice, or seriously call[s] into question the competence or integrity of the district judge." J.A. 36. That holding is mistaken.

First, the Fifth Circuit's standard is unduly strict and was improperly lifted from incongruous legal contexts. The shocks-the-conscience test is directed towards deliberate executive misconduct—formulated to capture only the most egregious misdeeds and strict enough to "categorically" exclude merely negligent action. *Cty. of Sacramento* v. *Lewis*, 523 U.S.

833, 849 (1998). Such a test has no relevance in the context of plain error review, which is almost always about mistakes that are at most negligent—as the Guidelines oversight was here. Indeed, Mr. Rosales-Mireles is not aware of a single instance in which the Fifth Circuit has granted relief under its heightened fourth-prong test.

Second, the Fifth Circuit's stringent standard undermines the Guidelines' core purposes and this Court's holding in *Molina-Martinez*. As for the Guidelines, the Fifth Circuit's test would leave miscalculated ranges uncorrected almost all of the time, eroding uniformity and proportionality and subverting the district courts' discretion to impose sentences under the correct range. As for *Molina-Martinez*, the Fifth Circuit's rule would turn this Court's holding upside down. No longer would "relief" be due "[i]n most cases" or "[i]n the ordinary case," 136 S. Ct. at 1343, 1349, because, even if a defendant satisfied the first three prongs, the fourth prong would preclude relief practically every time. The Court should reject such a backwards result.

ARGUMENT

Federal Rule of Criminal Procedure 52(b) authorizes courts of appeals to correct unpreserved errors when justice demands. *Olano*, 507 U.S. at 735–36. The obvious injustice in sentencing defendants under mistakenly high Sentencing Guidelines ranges is precisely the kind of error that should ordinarily be corrected, but the Fifth Circuit's shocks-the-conscience test ensures that such errors will ordinarily be left uncorrected—and defendants will be left to serve excess time in prison by mistake.

I. IN THE ORDINARY CASE, A GUIDELINES MISCALCULATION SATISFIES THE FOURTH PRONG OF THE *OLANO* STANDARD FOR PLAIN ERROR REVIEW.

Rule 52(b) requires defendants to show that (1) there was an "error," (2) that is "plain," and (3) "affect[s] substantial rights." *Olano*, 507 U.S. at 732–34. If those three requirements are met, the court of appeals "should exercise its discretion to correct the forfeited error if the error seriously affects the fairness, integrity or public reputation of judicial proceedings." *Molina-Martinez*, 136 S. Ct. at 1343. That final step should ordinarily be satisfied—and the courts of appeals therefore should exercise their discretion—when a defendant is sentenced under an incorrect Guidelines range.

A. Certain Kinds Of Plain Errors, Like A Miscalculated Sentencing Guidelines Range, Ordinarily Should Be Corrected.

1. Courts of appeals have discretion to correct plain errors under the fourth prong, but discretion is a matter of "judgment[,] to be guided by sound legal principles." *Wall* v. *Kholi*, 562 U.S. 545, 559 (2011) (quoting *United States* v. *Burr*, 25 F. Cas. 30, 35 (No. 14,692d) (C.C. Va. 1807) (Marshall, C.J.)). In the context of the fourth prong of plain error review, "the standard that should guide the exercise of remedial discretion" is whether "the error seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Olano*, 507 U.S. at 736.

This Court has provided some indication of what sorts of errors satisfy that standard. "[C]ircumstances in which a miscarriage of justice would otherwise result," for example, plainly suffice. *Id.*; see also *Johnson* v. *United States*, 520 U.S. 461, 470 (1997) ("No

'miscarriage of justice' will result here if we do not notice the error."). And that of course means that a "court of appeals should no doubt correct a plain forfeited error that causes the conviction or sentencing of an actually innocent defendant." *Olano*, 507 U.S. at 736. But the standard codified in Rule 52(b)—that is, the "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings" test—extends well beyond actual innocence, to correct additional plain errors. *Id.* (citing *United States* v. *Atkinson*, 297 U.S. 157, 160 (1936)).

Some plain errors are of a type that "should," in most cases, be corrected. *Id.* In *Brasfield* v. *United States*, for example, this Court recognized that "the practice of inquiring of a jury, unable to agree, the extent of its numerical division" is "ground for reversal," because it "is never useful and is generally harmful, [and so] is not to be sanctioned." 272 U.S. 448, 449–50 (1926) (cited in *Atkinson* for what became the fourth-prong standard). Similarly, in *Puckett*, the Court acknowledged that, "when the Government reneges on a plea deal, the integrity of the system may be called into question," and correction would thus ordinarily be appropriate, but noted that there could always be "countervailing factors in particular cases" that counsel against it. 556 U.S. at 142–43.

2. Within the universe of plain errors, an erroneous Guidelines range is the type of error that seriously affects the fairness, integrity, or public reputation of judicial proceedings and therefore "should [be] correct[ed]" in the ordinary case. *Molina-Martinez*, 136 S. Ct. at 1343. Leaving such errors in place, by contrast, "call[s] into question" "the integrity of the system," *Puckett*, 556 U.S. at 142–43, because, in the end, "who wouldn't hold a rightly diminished view of

[the] courts if [they] allowed individuals to linger longer in prison than the law requires only because [they] were unwilling to correct [their] own obvious mistakes?" *Hicks*, 137 S. Ct. at 2001 (Gorsuch, J., concurring); see also *United States* v. *Martinez-Rios*, 143 F.3d 662, 676 (2d Cir. 1998) ("[O]ne would be hard-pressed to think of a more senseless injustice than the deprivation of a citizen's liberty for several months as a result of a clerical error.").

This Court has often said that "any deprivation of liberty is a serious matter," *Argersinger* v. *Hamlin*, 407 U.S. 25, 41 (1972) (Burger, C.J., concurring), and imprisonment is uniquely so. Indeed, "*any* amount of actual jail time has Sixth Amendment significance." *Glover* v. *United States*, 531 U.S. 198, 203 (2001) (emphasis added). "[T]he prospect of imprisonment for however short a time will seldom be viewed ... as a trivial or 'petty' matter and may well result in quite serious repercussions affecting [a defendant's] career and his reputation." *Baldwin* v. *New York*, 399 U.S. 66, 73 (1970). Nor, "[t]o a prisoner," is "time behind bars ... some theoretical or mathematical concept. It is something real, even terrifying." *Barber* v. *Thomas*, 130 S. Ct. 2499, 2517 (2010) (Kennedy, J., dissenting). Congress has recognized that reality as well through the so-called "parsimony" provision, 18 U.S.C. § 3553(a), requiring judges to "impose a sentence sufficient, but no greater than necessary." See also *United States* v. *Pennington*, 667 F.3d 953, 957 (7th Cir. 2012) ("four months in prison cannot be summarily dismissed as insignificant"). It is thus "clear that commitment for any purpose constitutes a significant deprivation of liberty." *Foucha* v. *Louisiana*, 504 U.S. 71, 80 (1992).

The Guidelines are singularly important in determining how long a prison sentence will be. They "pro-

vide the framework for the tens of thousands of federal sentencing proceedings that occur each year," *Molina-Martinez*, 136 S. Ct. at 1342, and district courts must consider them, 18 U.S.C. § 3553(a); *United States* v. *Booker*, 543 U.S. 220, 259 (2005). They are not only "the starting point and the initial benchmark" for any sentence, *Gall*, 552 U.S. at 49, but they are "also the lodestar," *Molina-Martinez*, 136 S. Ct. at 1346. In other words, they are, "in a real sense the basis for the sentence" imposed in each case. *Peugh* v. *United States*, 133 S. Ct. 2072, 2083 (2013).

The numbers confirm as much. Nationally, a staggering 97.6% of sentences are within or below the applicable Guidelines range. See U.S. Sentencing Commission, Sourcebook of Federal Sentencing Statistics, tbl. N (2016). Broken down, 76.8% of sentences fall within the range or below that range based on a Government motion, and another 20.8% are below the range for other reasons. *Id.*; see also *Molina-Martinez*, 136 S. Ct. at 1346 (reciting similar data). Those statistics make plain that judges almost always view the Guidelines range as, at most, a ceiling. As a result, "when a Guidelines range moves up or down, offenders' sentences move with it." *Peugh*, 133 S. Ct. at 2084.

The technical calculations behind Guidelines ranges, moreover, are a critical part of the *judicial* process that *Olano*'s fourth prong seeks to protect. Guidelines ranges are first calculated by a probation officer in a presentence report, 18 U.S.C. § 3552(a); Fed. R. Crim. P. 32(c); *Molina-Martinez*, 136 S. Ct. at 1342, and district judges are "directed to impose [a] sentence after a comprehensive examination of the characteristics of the particular offense and the particular offender" from the presentence investigation report, S. Rep. No.

98-225, at 53 (1983). As Judge Pryor, Acting Chair of the Sentencing Commission, has observed, because presentence reports "became the epicenter of the guidelines sentencing process," probation officers have assumed an indispensable role in the Guidelines system, acting as "arms of the court." William H. Pryor, Jr., *The Integral Role of Federal Probation Officers in the Guidelines System*, 81 Fed. Probation 13, 15 (Sept. 2017).

Given the Guidelines' centrality to judicial proceedings, it is "easy to see why prejudicial sentencing errors undermine the fairness, integrity, and public reputation of [those] proceedings" in the ordinary case. *United States* v. *Castillo-Casiano*, 198 F.3d 787, 792 (9th Cir. 1999). After all, the inescapable reality is that the Guidelines "are complex, and so there will be instances when a district court's sentencing of a defendant within the framework of an incorrect Guidelines range goes unnoticed." *Molina-Martinez*, 136 S. Ct. at 1342–43. "[S]uch errors" generally result in "a longer sentence than might have been imposed had the court not plainly erred" and generally should be fixed. *Castillo-Casiano*, 198 F.3d at 792. In short, the Guidelines' "systemic function" and "[e]ffect [on] the sentence" in "the usual case" is "essential to the application of Rule 52(b) to a Guidelines error." *Molina-Martinez*, 136 S. Ct. at 1346.

The benefits of correcting Guidelines errors under *Olano*'s fourth prong are also clear. First, correction gives district courts the opportunity to properly discharge their sentencing roles. "[I]t allows a sentencing court to make, for the first time, a discretionary determination necessary to arrive at an appropriate sentence." *Castillo-Casiano*, 198 F.3d at 792. By extension, remand for resentencing protects the fairness, integrity, and public reputation of judicial pro-

ceedings and "actually affords deference and respect for the District Court judge." *United States* v. *Langford*, 516 F.3d 205, 220 (3d Cir. 2008). Real-world experience supports such efforts: when judges resentence defendants on remand following Guidelines errors, most elect to impose lower sentences.

Second, correcting these errors furthers the Guidelines' overarching purpose: to achieve "*uniformity* in sentencing ... imposed by different federal courts for similar criminal conduct, as well as *proportionality* in sentencing through a system that imposes appropriately different sentences for criminal conduct of different severity." *Rita* v. *United States*, 551 U.S. 338, 349 (2007); see also USSG Ch.1, Pt.A(3), p.s. (2016). Before the Guidelines, "punishments for identical actual cases could range from three years to twenty years imprisonment," even within the same Circuit. Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 5 (1988). The Guidelines sought to remedy that by "providing certainty and fairness in sentencing and reducing unwarranted sentence disparities." 28 U.S.C. § 994(f); see also 28 U.S.C. § 991(b); 18 U.S.C. § 3553(a)(6) (directing sentencing court to consider "the need to avoid unwarranted disparities among defendants with similar records who have been found guilty of similar conduct"). Sending cases back for resentencing under the Guidelines range that every other similarly situated defendant properly received furthers that goal.

Third, Guidelines errors reverberate beyond the length of imprisonment, both in individual cases and systemically. The Bureau of Prisons, for instance, uses the defendant's criminal history category, as recorded in the presentence report and district court's statement of reasons, in deciding how to designate

and classify prisoners. Federal Bureau of Prisons, *Program Statement P5100.08–Inmate Security Designation and Custody Classification*, Ch. 2, at 1; Ch. 4, at 8; Ch. 6, at 5 (Sept. 12, 2006), https://www.bop.gov/policy/progstat/5100_008.pdf. In a similar vein, if a defendant's term of supervised release is revoked, the Guidelines use the criminal history category from his *original* sentencing to determine a recommended range of punishment. USSG § 7B1.4 comment. (n.1) (category to be used "is the category determined at the time the defendant originally was sentenced to the term of supervision"). The Sentencing Commission also uses the presentence reports, as it collects data on Guidelines calculations to analyze the efficacy of the Guidelines and to make recommendations to Congress. 28 U.S.C. § 994(w); see *Rita*, 551 U.S. at 350. These widespread repercussions demonstrate the systemic harm that follows from leaving Guidelines errors uncorrected.

Finally, remanding for resentencing in the ordinary case is a "simple task." *Castillo-Casiano*, 198 F.3d at 792. Although "not costless, [it] does not invoke the same difficulties as a remand for retrial does." *Molina-Martinez*, 136 S. Ct. at 1348–49; see also *United States* v. *Sabillon-Umana*, 772 F.3d 1328, 1333–34 (10th Cir. 2014) (remand "simply allows the district court to exercise its authority to impose a legally permissible sentence"). Indeed, the cost savings trickle down systemically, as shorter prison terms of course cost less. See United States Courts, *Incarceration Costs Significantly More Than Supervision* (Aug. 17, 2017), http://www.uscourts.gov/news/2017/08/17/incarceration-costs-significantly-more-supervision (one year of imprisonment costs over $30,000 more than one year of supervised release—roughly $2,500 more per month). Given the low costs and substantial

benefits of correcting Guidelines errors, remand is warranted in the ordinary case.

3. Congress and almost all courts of appeals agree that most Guidelines errors seriously affect the fairness, integrity, or public reputation of judicial proceedings. As for Congress, it has mandated that, when the court of appeals determines that a sentence was "imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings." 18 U.S.C. § 3742(f)(1). Whether or not that provision extends to unpreserved errors, it undeniably reflects Congress's considered judgment that Guidelines range errors are sufficiently serious to require remand.

As for the courts of appeals, they are virtually unanimous (save the Fifth Circuit). They instruct, for example, that a Guidelines calculation error "usually satisf[ies]" the fourth prong, *Sabillon-Umana*, 772 F.3d at 1333, "ordinarily" warrants remand, *United States* v. *Figueroa-Ocasio*, 805 F.3d 360, 374 (1st Cir. 2015), or "generally" should cause the appeals court to "exercise [its] discretion to recognize [the] plain error," *United States* v. *Dahl*, 833 F.3d 345, 359 (3d Cir. 2016). See also *Sabillon-Umana*, 772 F.3d at 1333 (collecting cases from six other circuits that "reached similar conclusions or even adopted an explicit presumption that a clear guidelines error will satisfy the latter two steps of plain error review"). That view is equally applicable when the error resulted in the use of a higher range that overlapped with the correct one. See, *e.g.*, *United States* v. *Syme*, 276 F.3d 131, 158 (3d Cir. 2002). And the courts of appeals also appreciate the inverse to be true—that is, the "failure to notice the error" in most cases would "adversely affect the public perception of the fairness of judicial pro-

ceedings." *United States* v. *Wernick*, 691 F.3d 108, 118 (2d Cir. 2012).

B. Correcting Guidelines Errors In The Ordinary Case Still Leaves Room For Countervailing Factors In Particular Cases.

The fourth prong tells courts of appeals considering Guidelines errors that they "*should* exercise [their] discretion to correct the forfeited error if the error seriously affects the fairness, integrity or public reputation of judicial proceedings." *Molina-Martinez*, 136 S. Ct. at 1343 (emphasis added). By framing the inquiry to set out the circumstances in which "the discretion conferred by Rule 52(b) *should be employed*," this Court has provided that courts of appeals retain the discretion inherent in Rule 52 while indicating how that discretion "should" typically be exercised when the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Olano*, 507 U.S. at 736 (emphasis added). In other words, "should" connotes an affirmative suggestion about what ordinarily ought to happen when the substantive standard is met.

At the same time, courts of appeals always have discretion to decline to remand when "countervailing factors" weigh against relief "on a case-specific and fact-intensive basis." *Puckett*, 556 U.S. at 142–43. Indeed, there are ready examples in which a court might choose to do so, notwithstanding a defendant's success on the first three prongs. For one, a court of appeals may decide, under the fourth prong, that a plain Guidelines error does not overcome a defendant's waiver in a plea agreement of his or her right to appeal sentences that did not "unreasonably exceed[ ] the Guidelines range determined by the Court." *United States* v. *Corso*, 549 F.3d 921, 924 (3d Cir. 2008).

For another, the court of appeals may decline relief when the sentence was already completed. See, *e.g.*, *United States* v. *Westover*, 435 F.3d 1273, 1276–77 (10th Cir. 2006). Or, a defendant might have a concurrently running sentence, such that remand to correct the Guidelines error in one sentence would accomplish nothing of any value. In each of those instances, the Guidelines error may well satisfy the third prong—because the district court might have imposed a different sentence but for the error—but "countervailing factors" nevertheless counsel against the exercise of discretion under the fourth prong.

All of this reinforces, rather than undermines, the proper result here: courts of appeals typically should exercise their discretion to correct plain Guidelines errors, but the occasional case may present countervailing reasons not to do so.

II. THE FIFTH CIRCUIT'S SHOCK-THE-CONSCIENCE STANDARD IS IRRECONCILABLE WITH THIS COURT'S PRECEDENTS AND IMPOSES AN IMPROPER BURDEN ON CRIMINAL DEFENDANTS.

The Fifth Circuit once again "stands generally apart from other Courts of Appeals with respect to its consideration of unpreserved Guidelines errors." *Molina-Martinez*, 136 S. Ct. at 1345. In its view, the fourth prong could be satisfied only when the error "shock[s] the conscience of the common man, serve[s] as a powerful indictment against our system of justice, or seriously call[s] into question the competence or integrity of the district judge." J.A. 36. That rule, cobbled together from wholly inapt due process precedent, gravely overstates *Olano*'s actual standard and renders *Molina-Martinez* a dead letter. Indeed, Mr. Rosales-Mireles is not aware of a single case in which

the Fifth Circuit has granted relief under its heightened fourth-prong test.

A. The Fifth Circuit's Standard Is Unduly Harsh And Has No Place In Plain Error Review.

Rule 52(b) exists to ensure "that obvious injustice be promptly redressed." *United States* v. *Frady*, 456 U.S. 152, 163 (1982). The Fifth Circuit's standard does the opposite. It is precisely the kind of "rigid and undeviating" rule that is "out of harmony with ... the rules of fundamental justice." *Olano*, 507 U.S. at 732.

1. Establishing that an error "shock[s] the conscience of the common man, serve[s] as a powerful indictment against our system of justice, or seriously call[s] into question the competence or integrity of the district judge," J.A. 36, is difficult, to say the least. No doubt that is why the Fifth Circuit has seemingly never found that the standard was met on plain error review.

"Shocks the conscience" is a substantive due process standard generally employed to test civil claims premised on physical violence or purposeful executive behavior. *Lewis*, 523 U.S. at 846. The test gained constitutional significance in *Rochin* v. *California*, 342 U.S. 165 (1952), and has been applied to cover, for example, "conduct intended to injure in some way unjustifiable by any government interest," *Lewis*, 523 U.S. at 849. It focuses on "executive action challenges." *Id.* at 847 n.8. And its target, like substantive due process more broadly, is "deliberate decisions of government officials to deprive a person of life, liberty, or property." *Daniels* v. *Williams*, 474 U.S. 327, 331 (1986).

The standard is exceptionally demanding by design. It emerged against the backdrop of "very narrow

scrutiny" that the Due Process Clause authorizes over state-court convictions, *Rochin*, 342 U.S. at 168, and serves to preserve the "constitutional proportions of constitutional claims" over executive actions, *Lewis*, 523 U.S. at 847 n.8. The test therefore captures only conduct "so 'brutal' and 'offensive' that it did not comport with traditional ideas of fair play and decency." *Breithaupt* v. *Abram*, 352 U.S. 432, 435 (1957). "[O]nly the most egregious official conduct," signaling a drastic departure from the norms of contemporary civilized conduct, "may fairly be said to shock the contemporary conscience." *Lewis*, 523 U.S. at 846–47 & n.8. Forcibly pumping a defendant's stomach qualifies, but a high-speed police chase ending in a deadly crash does not. *Id.* at 854–55; *Rochin*, 342 U.S. at 172.

To the extent the Fifth Circuit's alternative formulations—including that the error "seriously call[s] into question the competence or integrity of the district judge," J.A. 36—have independent meaning, they are equally stringent. Such an error requires, for example, that the district judge "impugn[ed] the integrity of our judicial system with incompetent or malicious decisions." *United States* v. *Escalante-Reyes*, 689 F.3d 415, 436 (5th Cir. 2012) (en banc) (Smith, J., dissenting). That is a very high bar.

2. These rigid standards are unsuitable for plain error review. Consider first the shocks-the-conscience requirement that doomed Mr. Rosales-Mireles in this case. J.A. 35–36. It is aimed at deliberate and offensive executive conduct, *e.g.*, *Daniels*, 474 U.S. at 331; *Breithaupt*, 352 U.S. at 435, and this Court has confirmed that merely negligent conduct is "categorically beneath" the threshold, *Lewis*, 523 U.S. at 849. But the whole point of plain error review is to fix overlooked mistakes made in the judicial process, not de-

liberate misdeeds by executive officials. See, *e.g.*, *United States* v. *Jaimes-Jaimes*, 406 F.3d 845, 851 (7th Cir. 2005) ("[Defendant] may have failed to notice the sentencing error, but so did defense counsel, the Assistant United States Attorney, the probation officer, and the district court judge."). Guidelines miscalculations are virtually always going to be negligent at most, and a standard that "categorically" excludes those errors from correction cannot possibly be the right one.

Asking whether a district judge was "incompetent" or "malicious" is similarly inappropriate. This Court has made clear that "plain error review is not a grading system for trial judges[,]" *Henderson* v. *United States*, 568 U.S. 266, 278 (2013), but that is the inevitable result of shifting the focus to the judge's competence or integrity, rather than the nature of the error at issue. Worse still, the Fifth Circuit's misguided focus on district judges calls to mind the constitutional protection against a biased judge (or a judge with an impermissible risk of actual bias). *Williams* v. *Pennsylvania*, 136 S. Ct. 1899, 1909 (2016). That structural error is so serious that it requires an automatic retrial. *Id.* at 1909–10. But this Court has never so much as hinted that the courts of appeals' discretion to remedy plain errors under Rule 52(b) is limited to the much stricter constitutional standard for structural errors.

Finally, demanding that an error act as a "powerful indictment against our system of justice" is equally flawed. The Fifth Circuit has not explained this phrase, and it is unclear that it adds anything to the Fifth Circuit's fourth-prong analysis.

In sum, the Fifth Circuit's standard fundamentally rewrites *Olano*'s fourth prong. It imports overly restrictive tests from inapposite areas of the law and

drastically overstates the burden defendants must meet. Because "[n]othing in the text of Rule 52(b), its rationale, or the Court's precedents supports" the Fifth Circuit's approach, *Molina-Martinez*, 136 S. Ct. at 1345, the Court should reject it.

B. The Fifth Circuit's Standard Is Especially Misguided In The Unique Context of Guidelines Errors.

The ramifications of the Fifth Circuit's heightened standard are especially egregious in the unique context of a miscalculated Guidelines range.

First, the Fifth Circuit's test would undermine the Guidelines' core purposes. Allowing sentences based on inaccurate Guidelines calculations to stand frustrates the "uniformity" and "proportionality" that Congress enacted the Guidelines to provide. *Rita*, 551 U.S. at 349. Miscalculated ranges "can be particularly serious," *Molina-Martinez*, 136 S. Ct. at 1345—indeed, "*any* amount of actual jail time" is "significant," *Glover*, 531 U.S. at 203 (emphasis added)—and Guidelines ranges are an essential part of sentencing proceedings. The Fifth Circuit's approach to plain error review sweeps aside all of these considerations.

Second, the Fifth Circuit's standard usurps the district court's discretion to sentence a defendant under the proper standards in the first instance. Courts of appeals are not supposed to "substitute [their] judgment for that of the sentencing court as to the appropriateness of a particular sentence." *Williams* v. *United States*, 503 U.S. 193, 205 (1992); see, *e.g.*, *United States* v. *Rushton*, 738 F.3d 854, 861 (7th Cir. 2013). Yet that is exactly what the Fifth Circuit's rule authorizes courts of appeals to do.

Finally, the Fifth Circuit's standard would effectively nullify the Court's recent holding in *Molina-*

Martinez. There, the Court held that "in the ordinary case a defendant will satisfy his burden to show prejudice [under the third prong] by pointing to the application of an incorrect, higher Guidelines range and the sentence he received thereunder." 136 S. Ct. at 1347. But under the Fifth Circuit's test, the same defendant who has "rel[ied] on the application of an incorrect Guidelines range to show an effect on his substantial rights," *id.* at 1348, would arrive at the fourth prong only to discover that his earlier showings made no practical difference. The Fifth Circuit's uniquely demanding test for the fourth prong should be rejected.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment below and remand to the Fifth Circuit.

Respectfully submitted,

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No. 16-9493

In the Supreme Court of the United States

FLORENCIO ROSALES-MIRELES, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Whether, in conducting plain-error review under Federal Rule of Criminal Procedure 52(b), a court of appeals should presume that an error in calculating a defendant's advisory Sentencing Guidelines range seriously affects the fairness, integrity, or public reputation of judicial proceedings.

TABLE OF CONTENTS

Page

Opinion below 1
Jurisdiction 1
Statutory provision and rules involved 1
Statement 1
A. Legal background 2
B. The present controversy 4
Summary of argument 9
Argument:
A forfeited Guidelines calculation error does not warrant correction under the fourth prong of the plain-error standard as a matter of course 12
A. Rule 52(b) grants courts limited authority to correct unpreserved errors in exceptional circumstances 13
B. A presumption that Guidelines calculation errors satisfy the fourth plain-error prong "in the ordinary case" has no basis in Rule 52(b) 18
1. A forfeited Guidelines error warrants reversal only in exceptional cases based on a case-specific and fact-intensive review 18
2. A presumption that Guidelines errors warrant reversal under the fourth plain-error prong is inconsistent with the plain-error standard 22
3. Petitioner's arguments to the contrary are unsound 27
C. Although the court of appeals' opinion inaccurately describes the fourth prong of the plain-error standard, its judgment reflects an appropriate exercise of discretion 33
1. The fourth plain-error prong is not limited to errors that "shock the conscience" 33

Table of Contents—Continued: Page

2. The court of appeals properly declined to correct the Guidelines calculation error in this case 36
Conclusion 40
Appendix — Statutory provision and rules 1a

TABLE OF AUTHORITIES

Cases:

Argersinger v. *Hamlin*, 407 U.S. 25 (1972) 28
Beckles v. *United States*, 137 S. Ct. 886 (2017) 2, 20
Black v. *Cutter Labs.*, 351 U.S. 292 (1956) 11, 36
Brasfield v. *United States*, 272 U.S. 448 (1926) 19
Burns v. *United States*, 501 U.S. 129 (1991) 2
County of Sacramento v. *Lewis*, 523 U.S. 833 (1998) 34
Gall v. *United States*, 552 U.S. 38 (2007) 2, 20
Greenlaw v. *United States*, 554 U.S. 237 (2008) 31
Henderson v. *United States*, 568 U.S. 266 (2013) 19, 26
Johnson v. *United States*, 520 U.S. 461 (1997) 16, 17, 29
Jones v. *United States*, 527 U.S. 373 (1999) 15, 17, 23
Molina-Martinez v. *United States*, 136 S. Ct. 1338 (2016) 3, 19, 21, 23, 25, 26
Padilla v. *Kentucky*, 559 U.S. 356 (2010) 31
Peguero v. *United States*, 526 U.S. 23 (1999) 14
Pepper v. *United States*, 562 U.S. 476 (2011) 27, 30, 32, 33
Puckett v. *United States*, 556 U.S. 129 (2009) ..... *passim*
Rita v. *United States*, 551 U.S. 338 (2007) 2, 21, 30, 31
Rochin v. *California*, 342 U.S. 165 (1952) 34
Sibron v. *New York*, 392 U.S. 40 (1968) 31
United States v. *Alegria-Alvarez*, 471 Fed. Appx. 271 (5th Cir. 2012) 35

Cases—Continued: Page

United States v. *Andino-Ortega*, 608 F.3d 305 (5th Cir. 2010) 35
United States v. *Atkinson*, 297 U.S. 157 (1936) 3, 11, 12, 16, 23
United States v. *Barbosa*, 698 Fed. Appx. 206 (5th Cir. 2017) 35
United States v. *Booker*, 543 U.S. 220 (2005) 31
United States v. *Burns*, 298 F.3d 523 (6th Cir.), cert. denied, 537 U.S. 1061, 537 U.S. 1064 (2002), and 538 U.S. 953 (2003) 25
United States v. *Corso*, 549 F.3d 921 (3d Cir. 2008), cert. denied, 557 U.S. 915 (2009) 24
United States v. *Cotton*, 535 U.S. 625 (2002) 15, 16, 17, 29, 39
United States v. *Dias*, 682 Fed. Appx. 292 (5th Cir. 2017) 35
United States v. *Dominguez Benitez*, 542 U.S. 74 (2004) 10, 14, 17
United States v. *Ellis*, 326 F.3d 593 (4th Cir.), cert. denied, 540 U.S. 907 (2003) 25
United States v. *Escalante-Reyes*, 689 F.3d 415 (5th Cir. 2012) 9, 33
United States v. *Flores-Mejia*, 759 F.3d 253 (3d Cir. 2014) 32
United States v. *Frady*, 456 U.S. 152 (1982) 11, 14, 17, 25
United States v. *Hernandez*, 690 F.3d 613 (5th Cir. 2012) 35
United States v. *Lewis*, 823 F.3d 1075 (7th Cir. 2016) 32
United States v. *Marcus*, 560 U.S. 258 (2010) 14, 15
United States v. *Marroquin*, 874 F.3d 851 (5th Cir. 2017) 35
United States v. *Martinez-Rodriguez*, 821 F.3d 659 (5th Cir. 2016) 35

Cases—Continued: Page

United States v. *Mendoza-Velasquez*, 847 F.3d 209 (5th Cir. 2017) 34
United States v. *Miller*, 657 Fed. Appx. 265 (5th Cir. 2016) 35
United States v. *Olano*, 507 U.S. 725 (1993) ..... *passim*
United States v. *Padilla*, 415 F.3d 211 (1st Cir. 2005) 32
United States v. *Rojas-Ibarra*, 669 Fed. Appx. 269 (5th Cir. 2016) 35
United States v. *Samas*, 561 F.3d 108 (2d Cir.), cert. denied, 558 U.S. 937 (2009) 25
United States v. *Santacruz-Hernandez*, 648 Fed. Appx. 456 (5th Cir. 2016) 35
United States v. *Sarabia-Martinez*, 779 F.3d 274 (5th Cir. 2015) 9
United States v. *Segura*, 747 F.3d 323 (5th Cir. 2014) 9, 33, 34, 35
United States v. *Solano-Hernandez*, 847 F.3d 170 (5th Cir.), petition for cert. pending, No. 16-9187 (filed May 1, 2017) 34
United States v. *Vonn*, 535 U.S. 55 (2002) 15, 17, 18, 27, 29
United States v. *Westover*, 435 F.3d 1273 (10th Cir.), cert. denied, 547 U.S. 1169 (2006) 24, 25
United States v. *Young*, 470 U.S. 1 (1985) ..... *passim*
Wainwright v. *Sykes*, 433 U.S. 72 (1977) 17, 18
Yakus v. *United States*, 321 U.S. 414 (1944) 13, 28

Constitution, statutes, guidelines, and rules:

U.S. Const.:
Amend. V 34
Grand Jury Clause 30
Amend. VI 30
Amend. XIV 34

Statutes, guidelines, and rules—Continued: Page

Sentencing Reform Act of 1984, Pub. L. No. 98-473, Tit. II, ch. II, § 213(a), 98 Stat. 2012 (18 U.S.C. 3742(f)(1)) 31
8 U.S.C. 1326(a) 2, 4, 36
8 U.S.C. 1326(b)(2) 2, 4, 36
18 U.S.C. 3552 2
18 U.S.C. 3552(a) 2
18 U.S.C. 3553(a) 2, 20, 37, 1a
18 U.S.C. 3553(a)(1)-(3) 20, 1a
18 U.S.C. 3553(a)(5)-(7) 20, 2a
18 U.S.C. 3553(c) 22
18 U.S.C. 3661 33
18 U.S.C. 3742(f)(1) 31
18 U.S.C. 3742(g) 32
18 U.S.C. 3771(a) (2012 & Supp. IV 2016) 32
Tex. Penal Code Ann. § 12.45 (West 1994) 6, 38
United States Sentencing Guidelines:
Ch. 1, Pt. 1, intro. comment. 1, § 4(h) 27
Ch. 2 (2015):
§ 2L1.2 6
§ 2L1.2(a) 5
§ 2L1.2(b)(1)(A)(ii) 5
§ 2L1.2, comment. (n.1(B)(iii)) 5
Ch. 4:
§ 4A1.3 ..... 7, 21, 37
§ 4A1.3(a)(1) 6
§ 4A1.3(a)(2)(E) 38
Ch. 5, Pt. K 21

Rules—Continued: Page

Fed. R. Crim. P.:

Rule 11 30
Rule 32 ..... 3, 4, 3a
Rule 32(c) 2, 3a
Rule 32(d) 2, 4a
Rule 32(e)(2) 3, 6a
Rule 32(f)(1) 3, 6a
Rule 32(g) 3, 7a
Rule 32(i)(1)(C) 3, 8a
Rule 32(i)(1)(D) 3, 8a
Rule 32(i)(3)(B) 3, 22, 8a
Rule 32(i)(4) 21, 9a
Rule 32(i)(4)(B) 32, 9a
Rule 43(a)(3) 22, 32
Rule 254 ..... 2, 12, 13, 17, 18, 10a
Rule 52(b) ..... *passim*, 10a

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BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (J.A. 32-38) is reported at 850 F.3d 246.

JURISDICTION

The judgment of the court of appeals was entered on March 6, 2017. The petition for a writ of certiorari was filed on June 5, 2017. The petition for a writ of certiorari was granted on September 28, 2017. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISION AND RULES INVOLVED

The pertinent statutory provision and rules are reproduced in an appendix to this brief. App., *infra*, 1a-10a.

STATEMENT

Following a guilty plea in the United States District Court for the Western District of Texas, petitioner was convicted of illegally reentering the United States after

having been removed following a conviction for an aggravated felony, in violation of 8 U.S.C. 1326(a) and (b)(2). J.A. 22-23. The district court sentenced him to 78 months of imprisonment, to be followed by three years of supervised release. J.A. 23-24. The court of appeals affirmed. J.A. 32-38.

A. Legal Background

Federal sentencing is governed by the overarching principle that the district court must impose a sentence "sufficient, but not greater than necessary," to serve the statutory purposes of sentencing. 18 U.S.C. 3553(a). "'[T]he starting point and the initial benchmark' for sentencing," is the calculation of a range under the advisory federal Sentencing Guidelines. *Beckles* v. *United States*, 137 S. Ct. 886, 894 (2017) (quoting *Gall* v. *United States*, 552 U.S. 38, 49 (2007)). To aid the court in that process, 18 U.S.C. 3552 requires that a U.S. probation officer conduct a presentence investigation of a defendant and, "before the imposition of sentence, report the results of the investigation to the court." 18 U.S.C. 3552(a); see Fed. R. Crim. P. 32(c) and (d) (describing presentence investigation and report). "The sentencing judge, as a matter of process, will normally begin by considering the presentence report and its interpretation of the Guidelines." *Rita* v. *United States*, 551 U.S. 338, 351 (2007).

Timely objections to the Guidelines interpretation contained in the presentence investigation report (PSR) are essential to the "focused, adversarial resolution" of sentencing disputes contemplated by the Federal Rules. *Burns* v. *United States*, 501 U.S. 129, 137 (1991); see generally Fed. R. Crim. P. 51(b) (requiring parties to "preserve a claim of error by informing the court—when the court ruling or order is made or sought—of

the action the party wishes the court to take, or the party's objection to the court's action and the grounds for that objection"). Under Rule 32, the parties receive copies of the PSR at least 35 days before the sentencing hearing and then have 14 days to submit objections to the PSR's factual findings and sentencing recommendations. Fed. R. Crim. P. 32(e)(2) and (f)(1). At least seven days before sentencing, the probation officer must submit a final version of the PSR and an addendum stating any unresolved objections. Fed. R. Crim. P. 32(g). As late as the sentencing hearing, a party may still be permitted, "for good cause," "to make a new objection." Fed. R. Crim. P. 32(i)(1)(D). At the hearing, the parties must be allowed to comment on "matters relating to an appropriate sentence," Fed. R. Crim. P. 32(i)(1)(C), and if portions of the PSR remain in dispute, the district court must "rule on the dispute or determine that a ruling is unnecessary either because the [dispute] will not affect sentencing, or because the court will not consider [it] in sentencing," Fed. R. Crim. P. 32(i)(3)(B).

If a party does not make a timely objection to the Guidelines calculation contained in the PSR, it may not obtain relief from an alleged error in that calculation on appeal unless it establishes a reversible "plain error" under Federal Rule of Criminal Procedure 52(b). See *Molina-Martinez* v. *United States*, 136 S. Ct. 1338, 1343 (2016). That standard requires the complaining party to establish (1) that the district court committed an error; (2) that the error is "clear" or "obvious" under existing law; and (3) that the error "affect[ed] [the party's] substantial rights." *United States* v. *Olano*, 507 U.S. 725, 732-735 (1993) (citations omitted). If all three of those requirements are satisfied, "the court of appeals has authority to order correction" of the error, "but [it] is

not required to do so." *Id.* at 735. A reviewing court may exercise its discretion to correct the error only if the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Id.* at 736 (quoting *United States* v. *Atkinson*, 297 U.S. 157, 160 (1936)) (brackets in original).

B. The Present Controversy

1. Petitioner is a citizen of Mexico who entered the United States illegally in 1997. PSR ¶ 44. In January 2010, petitioner was removed to Mexico following a conviction in Texas state court for an aggravated assault in which he stabbed a man in the chest and shoulder. PSR ¶¶ 5, 6, 29. Later that month, petitioner reentered the United States illegally by wading across the Rio Grande near Laredo, Texas. PSR ¶ 7.

In June 2015, agents with the U.S. Department of Homeland Security, Immigration and Customs Enforcement (ICE) received information from the Travis County jail in Austin, Texas, that petitioner had been arrested for domestic violence. PSR ¶ 4. According to the arrest report, petitioner got into a physical altercation with his wife and 14-year-old son after an argument, during which he grabbed his wife by the hair and punched her in the face repeatedly. PSR ¶¶ 31, 47. After being convicted in Texas state court of assaulting his wife and son, petitioner was released to ICE custody. PSR ¶¶ 4, 31.

2. Following a guilty plea, petitioner was convicted of illegally reentering in the United States after having been removed following a conviction for an aggravated felony, in violation of 8 U.S.C. 1326(a) and (b)(2). J.A. 22-23.

a. In accordance with Rule 32, the Probation Office conducted a presentence investigation and prepared a PSR for the district court. The Office determined that petitioner's base offense level under the Sentencing

Guidelines was eight. PSR ¶ 12 (citing Sentencing Guidelines § 2L1.2(a) (2015)). The Office recommended a 16-level increase under Section 2L1.2(b)(1)(A)(ii), because petitioner previously had been removed from the United States following a conviction for a felony crime of violence. PSR ¶ 13; see Sentencing Guidelines § 2L1.2, comment. (n.1(B)(iii)) (2015) (defining "[c]rime of violence" to include "aggravated assault"). It also recommended a three-level reduction of petitioner's offense level for acceptance of responsibility, resulting in a total offense level of 21. PSR ¶¶ 19-21.

The Probation Office further determined that petitioner had a criminal history score of 13, which placed him within criminal history category VI, the highest in the Guidelines. PSR ¶ 33. The Office noted that petitioner had several prior convictions, including the 2009 aggravated assault conviction that resulted in his initial removal, PSR ¶ 29; the 2015 conviction for assaulting his wife and son, PSR ¶ 31; and another conviction in January 2002 for assaulting his wife (who was then his girlfriend), PSR ¶ 25. The latter conviction should have been assessed two criminal history points, but the Probation Office mistakenly counted it twice and assessed it four points. PSR ¶¶ 25, 30.

The Probation Office also noted that petitioner had numerous prior arrests, including an arrest for choking his wife in March 2002. PSR ¶¶ 34-38. The Office observed that petitioner was not convicted of assault in connection with that offense due to a provision of Texas law that permitted him to admit his guilt to the March 2002 assault in connection with his sentencing for the January 2002 assault, have both crimes considered in

imposing a single sentence, and incur only one conviction. PSR ¶¶ 25, 38 (citing Tex. Penal Code Ann. § 12.45 (West 1994)).

Petitioner's total offense level of 21 and criminal history category of VI resulted in an advisory Sentencing Guidelines range of 77 to 96 months of imprisonment. PSR ¶ 60. The Probation Office further noted that petitioner's numerous convictions and arrests "demonstrated his blatant disregard toward society and the laws of this country," and thus could warrant an upward departure under Sentencing Guidelines § 4A1.3(a)(1). PSR ¶ 75. Petitioner did not object to any aspect of the PSR. Addendum to the PSR 1.

b. Prior to sentencing, petitioner filed a motion for a below-Guidelines sentence, requesting 41 months of imprisonment. D. Ct. Doc. 26 (Feb. 10, 2016). Petitioner contended that the lower sentence was appropriate in light of a proposed change to Section 2L1.2 that he argued would, if applied to him, lower his total offense level and thus lower his Guidelines range to 41 to 51 months. *Id.* at 1. He further argued that a lower sentence was warranted because his conviction for aggravated assault, which resulted in the 16-level increase to his total offense level, was based on 2001 conduct; his subsequent offenses were less serious; he had only one prior immigration conviction; and his family relied on him for support. *Id.* at 2-3.

3. The district court adopted the findings and Guidelines calculations in the PSR and sentenced petitioner to 78 months of imprisonment, to be followed by three years of supervised release. J.A. 12-21; Statement of Reasons 1.

The district court began the sentencing hearing by briefly summarizing the PSR. J.A. 14. It described petitioner's current offense and reviewed his criminal history, noting that petitioner had repeatedly assaulted his wife, stabbed a man, used multiple names and false social security numbers to avoid detection while he was illegally present in the United States, and had been removed from the United States on one occasion and apprehended for an immigration offense on another. *Ibid.* The court invited petitioner to address the court with "anything that [he] would like to say." J.A. 15; see J.A. 15-16. And, following a colloquy with petitioner, the court permitted petitioner's counsel to speak on his behalf, who reiterated petitioner's request for a 41- to 51-month sentencing range. J.A. 16-17.

The district court then announced petitioner's sentence. In rejecting petitioner's request for a 41- to 51-month sentencing range, the court stated that "under the consideration" set forth in Sentencing Guidelines § 4A1.3, which authorizes departures from the Guidelines based on criminal history, the court "would have not sentenced [petitioner] to anything less than the 78 months after * * * his conduct in these cases." J.A. 19. The court explained that a 78-month sentence was appropriate given the nature and the circumstances of the offense and history and characteristics of petitioner. J.A. 20. The court recounted petitioner's prior illegal entry, his attempts to hide in the United States through his use of multiple aliases and other false identification information, and his repeated "assaultive behavior" stretching back to 2001, making it "obvious" that petitioner was "a threat to the public." *Ibid.* The court also noted the need to promote respect for the law,

to provide just punishment for petitioner's offense, and to deter petitioner from committing further crimes. *Ibid.*

4. The court of appeals affirmed. J.A. 32-38. Petitioner argued, for the first time on appeal, that the district court erred in calculating his criminal history category by double counting his conviction for the January 2002 assault. Pet. C.A. Br. 8-12. He asserted that, absent that erroneous calculation, he would have had a criminal history category of V rather than VI and an advisory Guidelines range of 70 to 87 months of imprisonment, instead of 77 to 96 months. *Id.* at 11.

The court of appeals rejected petitioner's argument. It explained that, because petitioner did not object to the PSR's criminal history calculation before the district court, his claim was reviewable only for plain error. J.A. 33. The court concluded that petitioner had satisfied the first three prongs of that standard because he had established "(1) an error; (2) that was clear or obvious; and (3) that affected his substantial rights." *Ibid.* With respect to the first and second prongs, the court accepted petitioner's contention that the district court erred in double counting a single conviction and that the error was "clear from the language of the Guidelines." J.A. 33-34 (citation omitted). With respect to the third prong, the court agreed with petitioner's assertion that the error affected his advisory sentencing range, and because the district court had not "explicitly and unequivocally indicate[d] that [it] would have imposed the same sentence * * * irrespective of the Guidelines range," the court concluded that petitioner had satisfied his burden of showing that the error affected his substantial rights. J.A. 35 (citation omitted; brackets in original).

The court of appeals, however, "elect[ed] not to exercise [its] discretion" to correct the Guidelines error.

J.A. 37. It explained that such an exercise of discretion would be appropriate only if petitioner established that the error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." J.A. 35-36 (quoting *United States* v. *Escalante-Reyes*, 689 F.3d 415, 419 (5th Cir. 2012) (en banc)). The court noted that "[t]he fourth prong . . . is not satisfied simply because the 'plainly' erroneous sentencing guideline range yields a longer sentence than the range that, on appeal, we perceive as correct." J.A. 36 (quoting *United States* v. *Sarabia-Martinez*, 779 F.3d 274, 278 (5th Cir. 2015)). "Rather," the court observed, "'[t]he types of errors that warrant reversal are ones that would shock the conscience of the common man, serve as a powerful indictment against our system of justice, or seriously call into question the competence or integrity of the district judge.'" *Ibid.* (quoting *United States* v. *Segura*, 747 F.3d 323, 331 (5th Cir. 2014) (brackets in original)). Noting that the district court had sentenced petitioner within the middle of the corrected range, the court of appeals concluded that the error in this case did not merit discretionary correction. J.A. 37.

SUMMARY OF ARGUMENT

On plain-error review under Federal Rule of Criminal Procedure 52(b), a forfeited claim of error in the calculation of a defendant's advisory Guidelines range should not warrant correction as a matter of course. Rather, such an error should be corrected only in exceptional cases in which, based on a review of the entire record, the court determines that the error seriously undermines the fairness, integrity, or public reputation of sentencing proceedings.

A. Rule 52(b) authorizes the correction of unpreserved claims of error only in exceptional circumstances.

The appellant must show that (1) the district court erred, (2) the error was plain, and (3) the error affected the appellant's substantial rights. *United States* v. *Olano*, 507 U.S. 725, 732-735 (1993). Even when each of those requirements is met, an appellate court has discretion to correct the error only if it "'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" *Id.* at 736 (citation omitted; brackets in original). The Court has made clear that this fourth prong of the plain-error standard imposes an independent barrier to relief that must be applied on "a case-specific and fact-intensive basis," *Puckett* v. *United States*, 556 U.S. 129, 142 (2009), to correct only "egregious errors," *United States* v. *Young*, 470 U.S. 1, 15 (1985) (citation omitted). Further, a court of appeals' discretion should be exercised in a manner that enforces the policies that underpin Rule 52(b) generally, "to encourage timely objections and reduce wasteful reversals by demanding strenuous exertion to get relief for unpreserved error." *United States* v. *Dominguez Benitez*, 542 U.S. 74, 82 (2004). Whether an exercise of that discretion is warranted in the context of a Guidelines error may turn on, among other things, the reasonableness of the sentence notwithstanding the error, the magnitude of the error in light of the sentencing as a whole, and whether the procedures used to determine the sentence were fundamentally fair.

B. Petitioner's contention that the fourth prong of the plain-error standard will be satisfied as a matter of course in cases involving a Guidelines calculation error is inconsistent with this Court's precedents and would render "the discretion afforded by Rule 52(b) * * * illusory." *Olano*, 507 U.S. at 737. In the context of a Guidelines error, petitioner's approach would collapse

the fourth prong into the third prong, eliminating it as an independent barrier to relief. It would make correction of such errors under plain-error review commonplace, rather than "exceptional." *United States* v. *Atkinson*, 297 U.S. 157, 160 (1936). It would eliminate any meaningful "case-specific and fact-intensive" analysis of such errors. *Puckett*, 556 U.S. at 142. And it would eviscerate the "careful balanc[e]" that the plain-error standard establishes to "encourage all trial participants to seek a fair and accurate trial the first time around" and to eliminate unnecessary, wasteful reversals and remands. *United States* v. *Frady*, 456 U.S. 152, 163 (1982). None of petitioner's justifications for this drastic shift in the Court's approach to plain error is convincing.

C. Although the court of appeals' opinion inaccurately describes the fourth prong of the plain-error standard, its judgment reflects an appropriate exercise of discretion. The government agrees with petitioner's contention that the "shock the conscience" formulation stated in this case and a handful of other cases is an inaccurate description of the fourth plain-error prong. But this Court "reviews judgments, not statements in opinions," *Black* v. *Cutter Labs.*, 351 U.S. 292, 297 (1956), and the court of appeals' decision to affirm petitioner's sentence notwithstanding his forfeited claim of error was within the bounds of the court's discretion. Petitioner's 78-month sentence is reasonable and reflects the district court's careful consideration of the facts of this case and the statutory purposes of sentencing. Moreover, the court could have calculated the same advisory range even without the error; the petitioner's sentence fell within the bottom half of both possible ranges; and the court indicated that it would not have sentenced pe-

titioner to less than 78 months based on his offense conduct and criminal history. Finally, petitioner was afforded ample procedural safeguards to ensure that his sentencing process was fair and that he had a sufficient opportunity to object to perceived errors in the PSR. Under these circumstances, the double-counting error petitioner belatedly identified is not so "particularly egregious," *Young*, 470 U.S. at 15 (citation omitted), that leaving his sentence intact seriously undermines the fairness, integrity, or public reputation of sentencing proceedings.

ARGUMENT

A FORFEITED GUIDELINES CALCULATION ERROR DOES NOT WARRANT CORRECTION UNDER THE FOURTH PRONG OF THE PLAIN-ERROR STANDARD AS A MATTER OF COURSE

If a defendant in a criminal case believes that a district court has erred, the Federal Rules of Criminal Procedure ordinarily require the defendant to either inform the court of his objection "when the court ruling or order is made or sought" or forfeit that claim. Fed. R. Crim. P. 51(b). A defendant who forfeits a claim of error may obtain relief from that error on appeal only by satisfying the rigorous requirements of the plain-error standard set forth in Federal Rule of Criminal Procedure 52(b), including by establishing that the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *United States* v. *Olano*, 507 U.S. 725, 736 (1993) (quoting *United States* v. *Atkinson*, 297 U.S. 157, 160 (1936)) (brackets in original).

Petitioner contends (Br. 9-18) that the fourth prong of the plain-error standard should be interpreted to require courts of appeals to correct erroneous applications of the Sentencing Guidelines "in the ordinary case" and that exceptions to that rule should be permitted only

"occasional[ly]." Petitioner's proposed rule would upend the usual course of plain-error review by placing a heavy thumb on the scale in favor of correcting unpreserved Guidelines errors, relieving defendants of the consequences of their failure to object and eliminating their incentive to raise many clear Guidelines errors at sentencing. The plain-error rule exists to prevent those outcomes. This Court should instead reaffirm that Rule 52(b) authorizes the correction of unpreserved errors only in exceptional circumstances and that the fourth prong of the standard applies with equal rigor to Guidelines errors and other errors that may occur in a criminal case, subject to the case-specific and fact-intensive analysis that application of that standard normally entails.

A. Rule 52(b) Grants Courts Limited Authority To Correct Unpreserved Errors In Exceptional Circumstances

1. "'No procedural principle is more familiar to this Court than that' * * * a right of any * * * sort, 'may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.'" *Olano*, 507 U.S. at 731 (quoting *Yakus* v. *United States*, 321 U.S. 414, 444 (1944)). Rule 51(b)—the contemporaneous-objection rule—instructs parties how to avoid such a forfeiture in a criminal case: "by informing the court—when the court ruling or order is made or sought—of the action the party wishes the court to take, or the party's objection to the court's action and the grounds for that objection." Fed. R. Crim. P. 51(b). "Failure to abide by this contemporaneous-objection rule ordinarily precludes the raising on appeal of the unpreserved claim of trial error." *Puckett* v. *United States*, 556 U.S. 129, 135 (2009). Rule 52(b)—the plain-error rule—"tempers the blow of

a rigid application of the contemporaneous-objection requirement," *United States* v. *Young*, 470 U.S. 1, 15 (1985), by providing that "[a] plain error that affects substantial rights may be considered even though it was not brought to the court's attention," Fed. R. Crim. P. 52(b).

The contemporaneous-objection and plain-error rules strike a "careful balanc[e]" between the "need to encourage all trial participants to seek a fair and accurate trial the first time around" and "our insistence that obvious injustice be promptly redressed." *United States* v. *Frady*, 456 U.S. 152, 163 (1982). In striking that balance, the rules "strictly circumscribe[]" an appellate court's "authority to remedy [a forfeited] error." *Puckett*, 556 U.S. at 134. An appellate court may correct such an error "only where the appellant demonstrates that (1) there is an 'error'; (2) the error is 'clear or obvious, rather than subject to reasonable dispute'; (3) the error 'affected the appellant's substantial rights, which in the ordinary case means' it 'affected the outcome of the district court proceedings'; and (4) 'the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" *United States* v. *Marcus*, 560 U.S. 258, 262 (2010) (citation omitted; brackets in original). The requirements of the plain-error rule are "as binding as any statute duly enacted by Congress," *Peguero* v. *United States*, 526 U.S. 23, 29 (1999) (citation omitted), and this Court has "repeatedly cautioned" that courts lack authority to create exceptions to the rule or to otherwise soften its application for certain types of errors, *Puckett*, 556 U.S. at 135. Meeting all four prongs of the plain-error standard "is difficult, 'as it should be.'" *Ibid.* (quoting *United States* v. *Dominguez Benitez*, 542 U.S. 74, 83 n.9 (2004)).

2. This case concerns an appellate court's discretionary decision to correct a forfeited error under the plain-error standard's fourth prong. By its terms, "Rule 52(b) is permissive, not mandatory." *Olano*, 507 U.S. at 735. The rule states that a "plain error that affects substantial rights *may* be considered," Fed. R. Crim. P. 52(b) (emphasis added), and thus even when the first three prongs of the plain-error standard are satisfied, "the court of appeals has the *discretion* to remedy the error." *Puckett*, 556 U.S. at 135; see *Olano*, 507 U.S. at 735 ("[T]he court of appeals has authority to order correction, but it is not required to do so."). As the Court has repeatedly explained, an "appellate court should exercise its discretion to correct plain error *only if* it 'seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.'" *Jones* v. *United States*, 527 U.S. 373, 389 (1999) (emphasis added; citations omitted; brackets in original); see, *e.g.*, *Marcus*, 560 U.S. at 265-266; *Puckett*, 556 U.S. at 135; *United States* v. *Cotton*, 535 U.S. 625, 631-632 (2002). In describing how to apply that standard, the Court has avoided bright-line rules or specific criteria, leaving the determination instead to "the sound discretion of the court of appeals." *Olano*, 507 U.S. at 732. The Court has, however, articulated several guideposts that are applicable here.

First, the Court has made clear that the fourth prong of the plain-error standard imposes an independent barrier to relief on a forfeited claim of error. "[A] plain error affecting substantial rights does not, without more, satisfy the * * * standard, for otherwise the discretion afforded by Rule 52(b) would be illusory." *Olano*, 507 U.S. at 737; see *United States* v. *Vonn*, 535 U.S. 55, 63 (2002) ("[B]ecause relief on plain-error review is in the discretion of the reviewing court, a defendant has

the further burden to persuade the court that the error 'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings.'") (citations and internal quotation marks omitted). The Court has thus repeatedly refused to correct plain errors, even where it found or assumed that each of the first three prongs of the plain-error standard was met. See, *e.g.*, *Johnson* v. *United States*, 520 U.S. 461, 469 (1997) ("[E]ven assuming that the [plain error] 'affec[ted] substantial rights,' it does not meet the final requirement of *Olano*.") (third set of brackets in original); *Cotton*, 535 U.S. at 632-633 (same).

Second, the fourth prong of the plain-error standard must be applied on "a case-specific and fact-intensive basis." *Puckett*, 556 U.S. at 142. This Court has consistently observed that "a '*per se* approach to plain-error review is flawed.'" *Ibid.* (quoting *Young*, 470 U.S. at 17 n.14). Rather, the Court has explained that "'each case necessarily turns on its own facts'" and that every claim of plain error must be evaluated "against the entire record." *Young*, 470 U.S. at 16 (citation omitted). "It is simply not possible for an appellate court to assess the seriousness of the claimed error by any other means." *Ibid.* Thus, in *Puckett*, the Court rejected the defendant's argument that the government's breach of a plea agreement that satisfied the first three plain-error prongs would necessarily satisfy the fourth prong of plain-error review. 556 U.S. at 142. "It is true enough," the Court explained, "that when the Government reneges on a plea deal, the integrity of the system may be called into question, but there may well be countervailing factors in particular cases." *Id.* at 142-143.

Third, a court of appeals may exercise its discretion to correct forfeited errors only in "exceptional circumstances." *Atkinson*, 297 U.S. at 160. "The plain error

rule is not a run-of-the-mill remedy." *Frady*, 456 U.S. at 163 n.14 (citation omitted). This Court has explained that a court's discretion to correct plain errors should be used "sparingly," *Jones*, 527 U.S. at 389, to set aside only "particularly egregious errors," *Young*, 470 U.S. at 15 (citation omitted). The Court has held, for example, that the fourth prong may justify denying relief even for clear and (assumedly) prejudicial constitutional errors such as failing to submit an offense element to the jury, *Johnson*, 520 U.S. at 469-470, and sentencing a defendant above the statutory maximum supported by the facts alleged in the indictment, *Cotton*, 535 U.S. at 632-633. Indeed, even where "policy interest[s]" make automatic reversal "essential" when a claim of error is preserved, the court will not "relieve the defendant of his usual burden" for a forfeited claim. *Puckett*, 556 U.S. at 141.

Finally, a court of appeals' discretion should be exercised in a manner that "enforce[s] the policies that underpin Rule 52(b) generally." *Dominguez Benitez*, 542 U.S. at 82. The balance struck by Rules 51(b) and 52(b) "serves to induce the timely raising of claims and objections, which gives the district court"—the court that "is ordinarily in the best position to determine the relevant facts and adjudicate the dispute"—"the opportunity to consider and resolve" the objections without additional, wasteful proceedings. *Puckett*, 556 U.S. at 134. It "encourages the result that [trial] proceedings be as free of error as possible." *Wainwright* v. *Sykes*, 433 U.S. 72, 90 (1977). And it diminishes opportunities for gamesmanship by preventing a litigant from "'sandbagging' the court—remaining silent about his objection and belatedly raising the error only if the case does not conclude in his favor." *Puckett*, 556 U.S. at 134; see *Vonn*,

535 U.S. at 73; *Wainwright*, 433 U.S. at 89. In short, the "point of the plain-error rule" is to "require[] defense counsel to be on his toes," *Vonn*, 535 U.S. at 73, and it must be applied with that goal in mind.

B. A Presumption That Guidelines Calculation Errors Satisfy The Fourth Plain-Error Prong "In The Ordinary Case" Has No Basis In Rule 52(b)

Petitioner's contention (Br. 9) that the fourth prong of the plain-error standard will "ordinarily be satisfied—and the courts of appeals therefore should exercise their discretion—when a defendant is sentenced under an incorrect Guidelines range," finds no support in the language or purposes of the plain-error rule. Claims that a sentencing court erred in its calculation of the advisory Guidelines range, like other errors in a criminal case, are subject to the stringent requirements of that rule. These include the requirement that a court exercise its discretion to remedy the error only in exceptional cases where, based on a careful review of the specific facts at issue, the court concludes that the particular error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." *Olano*, 507 U.S. at 736 (citation omitted).

1. A forfeited Guidelines error warrants reversal only in exceptional cases based on a case-specific and fact-intensive review

As explained, a party wishing to preserve a claim of Guidelines error must inform the district court of its objection "when the court ruling or order is made or sought." Fed. R. Crim. P. 51(b). Federal sentencing procedures provide defendants (and the government) ample opportunity to object to any Guidelines calculation presented to the court in the PSR. See pp. 2-3, *supra*.

Accordingly, this Court has explained that, when a criminal defendant "fail[s] to object to the miscalculation [of the Guidelines range], appellate review of the error is governed by Federal Rule of Criminal Procedure 52(b)." *Molina-Martinez* v. *United States*, 136 S. Ct. 1338, 1343 (2016); cf. *Henderson* v. *United States*, 568 U.S. 266, 268-270 (2013) (applying plain-error standard to a forfeited objection to an above-Guidelines sentence); *Puckett*, 556 U.S. at 131-134 (applying plain-error standard to a forfeited objection that the government breached its agreement to request a Guidelines reduction at sentencing).

In *Molina-Martinez*, this Court concluded that an error in calculating the Guidelines range "can, and most often will, be sufficient to show a reasonable probability of a different outcome absent the error" for purposes of determining whether the defendant has established an effect on his substantial rights under the third prong of the plain-error standard. 136 S. Ct. at 1345. The Court noted that the Guidelines have a "central role in sentencing," *ibid.*, and "[i]n the usual case, * * * the systemic function of the selected Guidelines range will affect the sentence," *id.* at 1346. The Court explained, however, that even where a clear Guidelines error is shown to have affected substantial rights, "appellate courts retain broad discretion" under the fourth prong "in determining whether a remand for resentencing is necessary." *Id.* at 1348.

That discretionary determination requires courts to decide whether an error prejudiced the administration of justice as a whole by seriously undermining matters "essential to the fair and impartial conduct" of the proceeding. *Brasfield* v. *United States*, 272 U.S. 448, 450

(1926). The court's inquiry into whether the overall process is fair, impartial, and deserving of public respect is necessarily broad in scope, and this Court has repeatedly noted that errors found to prejudice the defendant do not necessarily or presumptively warrant the exercise of discretion under that standard. See, *e.g.*, *Olano*, 507 U.S. at 736-737. In the context of Guidelines errors, courts may consider a number of factors to determine whether the error impugns the sentencing process as a whole.

First, courts may consider whether the sentence reflects a reasonable application of the district court's sentencing discretion notwithstanding the error. The overarching requirement of federal sentencing is the direction to "impose a sentence sufficient, but not greater than necessary" to achieve the statutorily authorized purposes of sentencing. 18 U.S.C. 3553(a). In addition to the Guidelines, "Congress has directed [district courts] to consider a number of other factors in exercising their sentencing discretion," including the need for a sentence to reflect the seriousness of the offense, to promote respect for the law, to provide just punishment, to afford adequate deterrence, and to protect the public from further crimes by the defendant. *Beckles* v. *United States*, 137 S. Ct. 886, 896 (2017) (citing 18 U.S.C. 3553(a)(1)-(3) and (5)-(7)). Sentencing courts must weigh those various factors as part of "an individualized assessment based on the facts presented," *id.* at 894 (citation omitted), and the resulting sentence is reviewed for reasonableness, *Gall* v. *United States*, 552 U.S. 38, 46 (2007). A sentence that is substantively unreasonable should be set aside regardless of the presence or absence of an objection, but on review for plain error, a sentence that is reasonable in light of all the relevant sentencing factors—despite the presence of a Guidelines error—is less likely

to indicate a serious injury to the fairness, integrity, or public reputation of judicial proceedings.

Second, and similarly, courts may consider the magnitude of the Guidelines error in light of the sentencing as a whole. A sentence that falls within the range applied by the district court and the range that would result from correction of the error may not warrant relief: in that circumstance, the sentence would reflect the Sentencing Commission's considered judgment—and may be presumed reasonable on appeal, see *Rita* v. *United States*, 551 U.S. 338, 347 (2007)—regardless of the error. Courts may also consider indications from the record that the district court was inclined to impose the same sentence regardless of the Guidelines range or believed that the sentence was appropriate based on other sentencing factors—both of which, in some circumstances, could also indicate a lack of effect on substantial rights. See *Molina-Martinez*, 136 S. Ct. at 1346-1347. Courts may additionally consider whether the sentencing court could have adopted the sentencing range it did through a proper application of the Guidelines (using the departure provisions in Sentencing Guidelines § 4A1.3 and Chapter 5, Part K, for example) absent the error.

Third, courts may consider whether the defendant was afforded procedural protections necessary to ensure the fairness and integrity of the sentencing proceeding. As explained, the Federal Rules require that defendants be afforded ample time to review the PSR and formulate objections and be given multiple opportunities to raise those objections with the court. See pp. 2-3, *supra*. Statutes and rules further provide that both the defendant and his attorney must be permitted to speak and offer information in mitigation, see Fed. R.

Crim. P. 32(i)(4); the court must rule on disputed issues, see Fed. R. Crim. P. 32(i)(3)(B); and the court must announce the sentence and the reasons supporting it in open court with the defendant present, see 18 U.S.C. 3553(c); Fed. R. Crim. P. 43(a)(3). Compliance with those requirements may mitigate the effect of a calculation error on the perceived fairness and public reputation of sentencing proceedings.

All of those factors, and others that may be relevant in particular cases, inform whether an unpreserved Guidelines calculation error qualifies as the sort of "exceptional" error that seriously impugns sentencing proceedings and may warrant correction in the court's discretion. A court cannot reliably make that determination without considering the full record of the sentencing and the grounds for the sentence imposed.

2. A presumption that Guidelines errors warrant reversal under the fourth plain-error prong is inconsistent with the plain-error standard

In arguing that most Guidelines errors should be deemed to satisfy the fourth prong as a matter of course, petitioner seeks to collapse the fourth prong into the third, paving the way for routine correction of such errors and rendering "the discretion afforded by Rule 52(b) * * * illusory." *Olano*, 507 U.S. at 737. Such a rule would be inconsistent with all four guideposts to the proper application of judicial discretion recognized in this Court's cases.

a. First, petitioner's rule would largely eliminate the fourth prong of plain-error review as an independent barrier to relief in Guidelines cases. Under petitioner's proposed rule, "'[i]n most cases,' * * * a showing that the district court 'mistakenly deemed applicable an incorrect, higher Guidelines range' should 'suffice for

relief.'" Pet. Br. 1 (quoting *Molina-Martinez*, 136 S. Ct. at 1346). But that is the standard for the third plain-error prong under *Molina-Martinez*, and it applies only "*if the other requirements of Rule 52(b) are met.*" 136 S. Ct. at 1346 (emphasis added). Petitioner complains (Br. 23) that, without his rule, a defendant who met the first three prongs of plain-error review might "arrive at the fourth prong only to discover that his earlier showings" were insufficient to justify relief. That is, however, exactly what the plain-error standard permits. Satisfying the first three prongs is *necessary* to obtain discretionary relief, but it is not *sufficient*. See *Olano*, 507 U.S. at 737 ("[A] plain error affecting substantial rights does not, *without more*, satisfy the [plain-error] standard.") (emphasis added).

b. Second, petitioner's rule would be inconsistent with this Court's guidance that the correction of error under Rule 52(b) should be used "sparingly," *Jones*, 527 U.S. at 389, reserved for "exceptional circumstances," *Atkinson*, 297 U.S. at 160, and "particularly egregious errors," *Young*, 470 U.S. at 15 (citation omitted). As this Court has recognized, "[t]he Guidelines are complex." *Molina-Martinez*, 136 S. Ct. at 1342. Minor, technical errors in the calculation of a defendant's Guidelines range are not uncommon and do not present an "exceptional circumstance[]," particularly where the record of the case as a whole indicates that the sentence is substantively reasonable. And requiring reversal and remand for resentencing in almost every such case would hardly be a "sparing[]" use of that remedy.

c. Third, petitioner's rule would contravene this Court's instruction that the decision whether to exercise a court's discretion under the plain-error standard must be evaluated on "a case-specific" basis, *Puckett*,

556 U.S. at 142, and judged "against the entire record," *Young*, 470 U.S. at 16. Petitioner asserts that, under his rule, courts of appeals would "retain the discretion" to "decline to remand when 'countervailing factors' weigh against relief" in a particular case. Pet. Br. 17 (quoting *Puckett*, 556 U.S. at 143). But the general rule is that forfeited errors of any type are *not* corrected on appeal. See *Olano*, 507 U.S. at 731. The plain-error rule carves out a narrow exception to that general rule that may be justified on a "case-specific and fact-intensive basis," *Puckett*, 556 U.S. at 142, not the other way around.

In any event, petitioner's examples of "countervailing factors" that would prevent a Guidelines error from satisfying the fourth prong make clear that he is really advocating a near-blanket rule that such errors be corrected regardless of the facts and circumstances of each case. Petitioner identifies (Br. 17-18) three types of cases that, in his view, present the sort of "countervailing factors" necessary to avoid correcting an error: (1) cases in which the defendant waived the claim in a plea agreement, see *United States* v. *Corso*, 549 F.3d 921, 924 (3d Cir. 2008), cert. denied, 557 U.S. 915 (2009); (2) cases in which the defendant already completed his term of imprisonment, see *United States* v. *Westover*, 435 F.3d 1273, 1277 (10th Cir.), cert. denied, 547 U.S. 1169 (2006); and (3) cases where the defendant is still serving a concurrent term of imprisonment "such that remand to correct the Guidelines error in one sentence would accomplish nothing of any value."

In the first type of case, however, a court would not engage in plain-error review at all, as the case on which petitioner relies indicates. See *Corso*, 549 F.3d at 928 ("[W]e will not review the District Court's application of the sentencing enhancements, or otherwise review his

sentence for reasonableness, if he validly waived his right to that review."). In the third type, although plain-error review would apply, a court of appeals would likely never get to the fourth prong because the existence of a concurrent sentence would obviate any likelihood that the error affected the defendant's substantial rights under the third prong. See, *e.g.*, *United States* v. *Samas*, 561 F.3d 108, 111 (2d Cir.) (per curiam), cert. denied, 558 U.S. 937 (2009); *United States* v. *Ellis*, 326 F.3d 593, 600 (4th Cir.), cert. denied, 540 U.S. 907 (2003); *United States* v. *Burns*, 298 F.3d 523, 544-545 (6th Cir.), cert. denied, 537 U.S. 1061, 537 U.S. 1064 (2002), and 538 U.S. 953 (2003).

That leaves only petitioner's second exception—challenges to terms of imprisonment that are already completed by the time the appeal is heard. That circumstance is likely to arise only in rare cases involving short terms of imprisonment and unexpired terms of supervised release that "prevent th[e] appeal from being moot." *Westover*, 435 F.3d at 1277. Petitioner identifies no plausible reason why the drafters of Rule 52(b) would have intended to limit a court's "broad discretion" under the fourth plain-error prong, *Molina-Martinez*, 136 S. Ct. at 1348, to unusual cases of that sort while opening the door to the routine correction of other unpreserved sentencing errors.

d. Finally, petitioner's rule would eviscerate the "careful balanc[e]" that the plain-error standard establishes to "encourage all trial participants to seek a fair and accurate trial *the first time around*" and to eliminate unnecessary, wasteful reversals and remands. *Frady*, 456 U.S. at 163 (emphasis added); see *Puckett*, 556 U.S. at 135 ("We have repeatedly cautioned that '[a]ny unwarranted extension' of the authority granted

by Rule 52(b) would disturb the careful balance it strikes between judicial efficiency and the redress of injustice.") (citation omitted; brackets in original).

The fourth prong is critical to maintaining that balance. This Court has repeatedly stated that giving parties greater leeway to satisfy other prongs of the plain-error standard is unlikely to subvert the incentive to object because the fourth prong remains an essential "screening criteri[on]" that enforces the contemporaneous-objection rule and conserves judicial resources. *Henderson*, 568 U.S. at 278; see *id.* at 275-276; *Molina-Martinez*, 136 S. Ct. at 1348-1349. Petitioner's proposed rule would undermine those protections and significantly diminish the incentives for defendants and their counsel to carefully scrutinize the PSR's Guidelines calculations and make timely objections. The limitations in Rule 52(b) that are designed to induce contemporaneous objections would "in the ordinary case" reduce to the fact that a clear error occurred.

Contemporaneous objections are vital as a general matter. See *Puckett*, 556 U.S. at 134. But the complexity of the Guidelines makes the need to encourage timely objections even more important. "[T]here will be instances when a district court[] sentenc[es] * * * a defendant within the framework of an incorrect Guidelines range." *Molina-Martinez*, 136 S. Ct. at 1342-1343. The proper way to minimize those errors is for the parties to address them when they occur and when they are easily remedied, through the detailed and comprehensive procedures provided by the Federal Rules. The type of error here—a miscalculation of a defendant's criminal history category—illustrates the point. Such errors involve determinations that the defendant is often best positioned to challenge.

Absent robust enforcement of the plain-error rule, a defendant would have little incentive to object to clear Guidelines errors, particularly minor or technical errors of the sort at issue here that result in only a modest change in the advisory range. Cf. Sentencing Guidelines Ch. 1, Pt. A, intro. comment. 1, § 4(h) (noting that, in such circumstances, "[b]oth prosecution and defense will realize that the difference between one level and another will not necessarily make a difference in the sentence that the court imposes"). In that circumstance, the defendant could simply await the results of the sentencing and, if the sentence is not to his liking, raise the error on appeal. Because the error, by itself, will ordinary satisfy the third prong of the plain-error standard under *Molina-Martinez*, and would presumptively satisfy the fourth prong under petitioner's rule, the defendant would be virtually assured of resentencing. And by the time resentencing occurs, the passage of time may provide the defendant with additional arguments. See *Pepper* v. *United States*, 562 U.S. 476, 492 (2011) (noting that "evidence of [a defendant's] conduct since his initial sentencing constitutes a critical part of the 'history and characteristics' of a defendant that Congress intended sentencing courts to consider" during resentencing) (citation omitted). That result would undermine the plain-error rule's core purpose of ensuring that "defense counsel * * * be on his toes, not just the judge." *Vonn*, 535 U.S. at 73.

3. Petitioner's arguments to the contrary are unsound

None of petitioner's arguments justifies the drastic shift in this Court's approach to plain error that his rule would require.

a. Petitioner's principal argument for requiring courts of appeals to correct forfeited Guidelines errors is that

such errors implicate a defendant's liberty. He notes that "'any deprivation of liberty is a serious matter,'" and asserts that the Guidelines play a "singularly important" role "in determining how long a prison sentence will be." Pet. Br. 11 (quoting *Argersinger* v. *Hamlin*, 407 U.S. 25, 41 (1972) (Burger, C.J., concurring in the result)).

That argument is misplaced. A "liberty interest * * * is always at stake in criminal cases." *Puckett*, 556 U.S. at 142 (citation omitted). And nearly any time a court exercises its discretion not to correct an error under the fourth prong of the plain-error standard, the defendant may end up remaining in prison longer than he would have if the error had been corrected. But this Court has repeatedly explained that such a concern, though weighty, does not warrant an exception to the ordinary operation of the contemporaneous-objection and plain-error rules. Those rules are a longstanding part of our law that serves important interests. See *Olano*, 507 U.S. at 731 ("'No procedural principle is more familiar to this Court than that' * * * a right of any * * * sort, 'may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right.'") (quoting *Yakus*, 321 U.S. at 444). Where a party—government or defendant—fails to abide by that rule, the law requires that party to accept the results unless the stringent requirements of the plain-error rule are met. Following those well-accepted rules does not impugn the fairness, integrity, or public reputation of judicial proceedings, but maintains it.

b. Petitioner contends (Br. 12-13) that the calculation of the advisory Guidelines range is "a critical part of the *judicial* process that *Olano*'s fourth prong seeks

to protect." But that is equally true of every other aspect of a criminal case during which an error might occur. The fourth prong of the plain-error standard applies to errors during grand jury proceedings, see *Cotton*, 535 U.S. at 632-634; plea proceedings, see *Vonn*, 535 U.S. at 62-63; and criminal trials, see *Johnson*, 520 U.S. at 469-470, just as much as errors in the "technical calculations behind Guidelines ranges," Pet. Br. 12. The question under the fourth prong is not whether an error in a criminal trial or sentencing implicates part of the judicial proceedings. It always will. And under the third prong, the error will have been sufficiently "critical" to those proceedings to give rise to a reasonable probability of having changed the outcome. The relevant question is whether enforcing the contemporaneous-objection rule with regard to a particular, prejudicial error in the context of a particular proceeding will seriously impugn the fairness, integrity, or public reputation of judicial proceedings as a whole. That a Guidelines calculation is an important part of federal sentencing proceedings does little to answer that question.

c. Petitioner notes (Br. 13-14) that remanding for resentencing would permit the district court to "properly discharge" its sentencing role. But, again, an analogous point could be made in every plain-error case. A reviewing court's decision that an error is not reversible plain error *necessarily* deprives the initial decisionmaker (be it the district court or jury) of the opportunity to perform its role absent the error. That is implicit in any plain-error (or harmless-error) rule for appellate review. The fault for that result, however, lies principally with the party who failed to raise the error before the initial decisionmaker. The enforcement of Rule 52(b)'s

requirements honors the district court's role by encouraging timely objections that will allow the court to "correct or avoid * * * mistake[s]" in the first instance. *Puckett*, 556 U.S. at 134.

d. Petitioner argues that failing to correct a forfeited Guidelines error frustrates the Guidelines' "overarching purpose" to achieve uniformity and proportionality in sentencing "'through a system that imposes appropriately different sentences for criminal conduct of different severity.'" Pet. Br. 14 (quoting *Rita*, 551 U.S. at 349). As this Court has previously recognized, however, there is "no evidence" that Congress sought to achieve those objectives "out of a concern with disparities resulting from the normal trial and sentencing process," of which the contemporaneous-objection and plain-error rules have long been a part. *Pepper*, 562 U.S. at 503. In any event, a similar criticism could be leveled at all uncorrected errors: a reviewing court's discretionary decision not to correct an instructional error "frustrates" the Sixth Amendment right to a jury finding on an element of the offense (*Johnson*); a reviewing court's decision not to correct an omission in an indictment "frustrates" the purpose of the Grand Jury Clause (*Cotton*); and a court of appeals' decision not to correct an error in a guilty plea proceeding "frustrates" the policy behind the requirements in Federal Rule of Criminal Procedure 11 (*Vonn*). Although the extent to which an uncorrected error undermines those purposes may reasonably factor into whether, in a given case, the fourth prong was satisfied, it provides no basis for circumventing that fact-specific inquiry.

e. Petitioner argues (Br. 14-15) that Guidelines errors may "reverberate beyond the length of imprison-

ment." But the same is true of a guilty plea and conviction. See *Sibron* v. *New York*, 392 U.S. 40, 55 (1968) ("Although the term has been served, the results of the conviction may persist. Subsequent convictions may carry heavier penalties, civil rights may be affected.") (citation omitted); see also *Padilla* v. *Kentucky*, 559 U.S. 356, 364-366 (2010). Such consequences are properly considered as a part of the fact-intensive fourth prong analysis; they are not reason to avoid it.

f. Petitioner cites (Br. 16) language in 18 U.S.C. 3742(f)(1) stating that a court of appeals "shall remand [a] case for further sentencing proceedings" if it determines that "the sentence was * * * imposed as a result of an incorrect application of the sentencing guidelines." That provision was enacted as part of the Sentencing Reform Act of 1984, Pub. L. No. 98-473, Tit. II, ch. II, § 213(a), 98 Stat. 2012, to address preserved errors in the application of the mandatory Guidelines that existed before this Court's decision in *United States* v. *Booker*, 543 U.S. 220 (2005). Even assuming the provision applies to the advisory Guidelines, but see *Rita*, 551 U.S. at 383 (Scalia, J., concurring in part and concurring in the judgment), it would not affect the application of the plain-error standard. At the time the Sentencing Reform Act was enacted, the plain-error rule (like the cross-appeal rule) was "a solidly grounded rule of appellate practice." *Greenlaw* v. *United States*, 554 U.S. 237, 250 (2008). "The inference properly drawn," then, "is that Congress was aware of the [plain-error] rule, and framed § 3742 expecting that the new provision would operate in harmony with [it]." *Ibid.*; cf. *Puckett*, 556 U.S. at 141 (applying ordinary plain-error review to a forfeited claim that the government breached a plea

agreement despite a rule of automatic reversal for preserved claims).

g. Finally, petitioner argues (Br. 15-16) that courts of appeals should remand for resentencing in the ordinary case on the theory that resentencing is a "simple task." *Id.* at 15 (citation omitted). That is wrong. Although resentencing proceedings do not involve the same costs as those required in a retrial, they are not simple and the costs can be significant. The sentencing framework and procedures "appl[y] both at a defendant's initial sentencing and at any subsequent resentencing after a sentence has been set aside on appeal." *Pepper*, 562 U.S. at 490; see 18 U.S.C. 3742(g) ("A district court to which a case is remanded * * * shall resentence a defendant in accordance with section 3553."). As a result, "[r]esentencing imposes a significant burden on district courts: not only do they have to find time in their busy dockets to revisit errors that could have been resolved with a contemporaneous objection at the original sentencing but they also have the burden of reconvening the parties involved, including the defendant, attorneys, witnesses, and law enforcement authorities." *United States* v. *Flores-Mejia*, 759 F.3d 253, 258 n.6 (3d Cir. 2014) (en banc); cf. *United States* v. *Padilla*, 415 F.3d 211, 225 (1st Cir. 2005) (en banc) (Boudin, J., concurring) ("The time of a judge is scarcest of all judicial resources.").

Defendants in the federal system may be imprisoned anywhere in the United States and must be transported back to the sentencing court. See Fed. R. Crim. P. 43(a)(3). Victims of the crime have a right to be heard and may feel the need to voice their concerns again. See 18 U.S.C. 3771(a) (2012 & Supp. IV 2016); Fed. R. Crim. P. 32(i)(4)(B); see also *United States* v. *Lewis*, 823 F.3d

1075, 1081 (7th Cir. 2016) ("We also keep in mind the costs of remands for resentencing, especially the human costs imposed on victims."). And because "[n]o limitation" may be placed "on the information concerning the background, character, and conduct of a person convicted of an offense" which the court may consider, including information of post-sentencing conduct, resentencing proceedings may involve extensive adversarial proceedings requiring further judicial factfinding. 18 U.S.C. 3661; see *Pepper*, 562 U.S. at 489. Significant costs may also arise from second (or successive) appeals from the resentencing. Such unnecessary use of judicial and government resources—as well as the human costs—is precisely what the contemporaneous-objection and plain-error rules are meant to avoid.

C. Although The Court Of Appeals' Opinion Inaccurately Describes The Fourth Prong Of The Plain-Error Standard, Its Judgment Reflects An Appropriate Exercise Of Discretion

1. The fourth plain-error prong is not limited to errors that "shock the conscience"

In describing the fourth prong of the plain-error standard, the court of appeals stated that "[t]he types of errors that warrant reversal are ones that would shock the conscience of the common man, serve as a powerful indictment against our system of justice, or seriously call into question the competence or integrity of the district judge." J.A. 36 (quoting *United States* v. *Segura*, 747 F.3d 323, 331 (5th Cir. 2014)) (brackets in original). That description of correctable errors originated in the dissenting opinion in *United States* v. *Escalante-Reyes*, 689 F.3d 415, 435 (5th Cir. 2012) (en banc) (Smith, J., dissenting), and has been incorporated

into a handful of Fifth Circuit decisions, largely without analysis. See, *e.g.*, *United States* v. *Mendoza-Velasquez*, 847 F.3d 209, 213 (2017) (per curiam); *United States* v. *Solano-Hernandez*, 847 F.3d 170, 178, petition for cert. pending, No. 16-9187 (filed May 1, 2017); *Segura*, 747 F.3d at 331.

The government agrees with petitioner's contention (Br. 18-23) that the "shock the conscience" formulation stated in this case and some other cases is an inaccurate description of the fourth plain-error prong. The "shock the conscience" standard is typically used to determine whether governmental action violates substantive due process under the Fifth or Fourteen Amendments. See *County of Sacramento* v. *Lewis*, 523 U.S. 833, 848 n.8 (1998) ("[I]n a due process challenge to executive action, the threshold question is whether the behavior of the governmental officer is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience."). Conduct that satisfies that standard usually is "intended to injure in some way unjustifiable by any government interest." *Id.* at 849; see *Rochin* v. *California*, 342 U.S. 165, 172-174 (1952) (explaining that the standard is intended to remedy "brutal conduct" by government officials). As such, it is an inapt description of the circumstances in which a court of appeals has discretion to correct an inadvertent error that has occurred in a criminal proceeding under plain-error review.

As for errors that "serve as a powerful indictment against our system of justice" or that "seriously call into question the competence or integrity of the district judge," J.A. 36 (citation omitted), such errors likely would meet the standard for exercising a court's discretion under the fourth prong of the plain-error standard. But those descriptions alone do not accurately capture

the myriad case-specific factors a court must consider in deciding whether to exercise its discretion to correct an unpreserved claim of error under Rule 52(b), and adopting the Fifth Circuit's description as a general standard could lead to applications of that rule that are inconsistent with this Court's settled understanding of plain-error analysis. Cf. *Olano*, 507 U.S. at 736 (rejecting a heightened standard for correcting plain error that would apply only to "an actually innocent defendant").

That said, it does not appear that the Fifth Circuit's description of correctable errors is intended to substantively modify the existing plain-error standard. The Fifth Circuit frequently cites (as it did here) the fourth prong's usual definition as well, see J.A. 35-36; see also, *e.g.*, *Segura*, 747 F.3d at 331 ("We may exercise our discretion to reverse under plain error review only where 'the error seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.'") (citation omitted; brackets in original), and the Fifth Circuit has regularly exercised its discretion under that prong without citing the description used in this case.* See also *United States* v. *Barbosa*, 698 Fed. Appx. 206, 206-207 (2017) (per curiam) (concluding that the "shock the conscience" description is inaccurate). Because this Court

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* See, *e.g.*, *United States* v. *Marroquin*, 874 F.3d 851, 855 (5th Cir. 2017); *United States* v. *Dias*, 682 Fed. Appx. 292, 295 (5th Cir. 2017) (per curiam); *United States* v. *Rojas-Ibarra*, 669 Fed. Appx. 269, 270 (5th Cir. 2016) (per curiam); *United States* v. *Miller*, 657 Fed. Appx. 265, 270-271 (5th Cir. 2016) (per curiam); *United States* v. *Santacruz-Hernandez*, 648 Fed. Appx. 456, 458 (5th Cir. 2016) (per curiam); *United States* v. *Martinez-Rodriguez*, 821 F.3d 659, 666-667 (5th Cir. 2016); *United States* v. *Hernandez*, 690 F.3d 613, 622 (5th Cir. 2012); *United States* v. *Alegria-Alvarez*, 471 Fed. Appx. 271, 275-276 (5th Cir. 2012) (per curiam); *United States* v. *Andino-Ortega*, 608 F.3d 305, 311-312 (5th Cir. 2010).

"reviews judgments, not statements in opinions," *Black* v. *Cutter Labs.*, 351 U.S. 292, 297 (1956), the relevant question in this case is whether the court of appeals' judgment reflects an appropriate exercise of discretion under Rule 52(b), not whether the court's description is apt.

2. The court of appeals properly declined to correct the Guidelines calculation error in this case

Under the proper case-specific and fact-intensive analysis of the fourth plain-error prong, the court of appeals' decision to affirm petitioner's sentence notwithstanding his forfeited claim of error was within the bounds of the court's discretion. Petitioner asserted for the first time in the court of appeals that the district court had erred in its calculation of his advisory sentencing range by double counting one of his prior assault convictions and thus adding two points to his criminal history. J.A. 32-33. Absent that error, petitioner claimed that his criminal history category would have been V, not VI, as the district court determined, and his advisory sentencing range would have been 70 to 87 months, not 77 to 96 months. J.A. 34; see Pet. C.A. Br. 11. In light of the entire record, the court of appeals permissibly concluded that the district court's error did not impugn "the fairness, integrity or public reputation of judicial proceedings." J.A. 35-36 (citations omitted).

Petitioner's 78-month sentence is reasonable and reflects the district court's careful consideration of the facts of this case and the statutory purposes of sentencing. Petitioner was convicted of illegally reentering the United States following a conviction for an aggravated felony, which is punishable by up to 20 years of imprisonment. See J.A. 22-23 (citing 8 U.S.C. 1326(a) and (b)(2)). As the district court explained at the sentencing

hearing, the nature and circumstances of petitioner's offense were "serious" and the "history and characteristics of the defendant are no better." J.A. 20. Petitioner committed his offense within weeks of being removed in 2010, PSR ¶ 7, and he managed to evade apprehension until 2015 through the use of "multiple names, * * * at least two birth dates," and "five false Social Security numbers," J.A. 14; see J.A. 20. Petitioner also has a long and violent criminal history that makes him an "obvious * * * threat to the public," J.A. 20, including multiple convictions for aggravated assault and assault of his wife and son, all of which involved acts of extreme violence, see J.A. 14; see also PSR ¶¶ 24-38. As the Probation Office concluded, petitioner has consistently "demonstrated his blatant disregard toward society and the laws of this country." PSR ¶ 75.

In imposing a 78-month sentence, the district court did not simply adopt the bottom of the Guidelines range. Instead, it selected a sentence within that range based on the sentencing factors identified in 18 U.S.C. 3553(a), including the "nature and the circumstance of the offense," "the history and characteristics of the defendant," and the need for the sentence to "promote respect for the law," to provide "just punishment for [petitioner's] offense," and to "keep [petitioner] from * * * returning to the United States to commit criminal conduct." J.A. 20. As the court explained after reviewing the considerations identified in Sentencing Guidelines § 4A1.3 governing departures based on criminal history, it "*would have not sentenced [petitioner] to anything less* than the 78 months" he received in light of his "conduct in these cases." J.A. 19 (emphasis added). And, because petitioner's 78-month sentence is also within the sentencing range petitioner claims was appropriate

(indeed, within the bottom half of that range), it would have been presumed reasonable on appeal even if he had timely raised his objection and the district court had adopted the lower range.

Moreover, even without the double-counting error petitioner identifies, the district court could still have properly applied the Guidelines to reach the same advisory sentencing range used in this case. As explained (pp. 5-6, *supra*), petitioner's January 2002 assault offense that was double counted *does* actually reflect two separate crimes. See PSR ¶¶ 25, 38. At the sentencing proceeding following petitioner's conviction for the January 2002 assault of his wife, petitioner admitted to having also assaulted his wife on a separate occasion in March 2002. Petitioner's sentence for the January 2002 assault incorporated the March 2002 assault; he merely avoided being formally convicted of the second offense due to the operation of a provision of Texas law that allows a defendant to admit his guilt to one offense during the sentencing for another, thereby avoiding a second conviction. See Tex. Penal Code Ann. § 12.45 (West 1994). Had the January 2002 assault not been counted twice in calculating petitioner's criminal history score, petitioner's admission to having committed the March 2002 assault may have provided a basis for an upward departure under the Guidelines. See Sentencing Guidelines § 4A1.3(a)(2)(E) (noting that upward departure in criminal history category may be authorized based on, *inter alia*, "[p]rior similar adult criminal conduct not resulting in a criminal conviction").

Finally, petitioner was afforded ample procedural safeguards to ensure that his sentencing process was fair and that he had a sufficient opportunity to object to

perceived errors in the PSR. Petitioner was represented by counsel, who received a copy of the PSR more than a month in advance of petitioner's sentencing hearing. J.A. 3-4. Petitioner and his attorney had approximately three weeks to review the PSR before needing to file any written objections, and petitioner was given a further opportunity to raise any concerns or provide any other relevant information to the district court, both personally and through counsel, at the sentencing hearing. See J.A. 3-4, 15-18.

In short, petitioner's sentence is reasonable, it could have been imposed under the Guidelines even if he had timely raised the error, and it was determined following a sentencing proceeding that was fundamentally fair. Under these circumstances, the double-counting error petitioner belatedly identified is not so "particularly egregious," *Young*, 470 U.S. at 15 (citation omitted), that leaving his sentence intact seriously undermines the fairness, integrity, or public reputation of sentencing proceedings. Indeed, "[t]he real threat * * * to the 'fairness, integrity, and public reputation of judicial proceedings' would be if [petitioner]," despite his offense conduct and criminal history, were to receive the benefits of resentencing "because of an error that was never objected to" before the district court. *Cotton*, 535 U.S. at 634.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. 18 U.S.C. 3553(a) provides:

Imposition of a sentence

(a) FACTORS TO BE CONSIDERED IN IMPOSING A SENTENCE.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.[1]

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

2. Fed. R. Crim. P. 32 provides in pertinent part:

Sentencing and Judgment

* * * * *

(c) Presentence Investigation.

(1) Required Investigation.

(A) In General. The probation officer must conduct a presentence investigation and submit a report to the court before it imposes sentence unless:

(i) 18 U.S.C. § 3593(c) or another statute requires otherwise; or

(ii) the court finds that the information in the record enables it to meaningfully exercise its sentencing authority under 18 U.S.C. § 3553, and the court explains its finding on the record.

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[1] So in original. The period probably should be a semicolon.

(B) Restitution. If the law permits restitution, the probation officer must conduct an investigation and submit a report that contains sufficient information for the court to order restitution.

(2) Interviewing the Defendant. The probation officer who interviews a defendant as part of a presentence investigation must, on request, give the defendant's attorney notice and a reasonable opportunity to attend the interview.

(d) Presentence Report.

(1) Applying the Advisory Sentencing Guidelines. The presentence report must:

(A) identify all applicable guidelines and policy statements of the Sentencing Commission;

(B) calculate the defendant's offense level and criminal history category;

(C) state the resulting sentencing range and kinds of sentences available;

(D) identify any factor relevant to:

(i) the appropriate kind of sentence, or

(ii) the appropriate sentence within the applicable sentencing range; and

(E) identify any basis for departing from the applicable sentencing range.

(2) Additional Information. The presentence report must also contain the following:

(A) the defendant's history and characteristics, including:

(i) any prior criminal record;

(ii) the defendant's financial condition; and

(iii) any circumstances affecting the defendant's behavior that may be helpful in imposing sentence or in correctional treatment;

(B) information that assesses any financial, social, psychological, and medical impact on any victim;

(C) when appropriate, the nature and extent of nonprison programs and resources available to the defendant;

(D) when the law provides for restitution, information sufficient for a restitution order;

(E) if the court orders a study under 18 U.S.C. § 3552(b), any resulting report and recommendation;

(F) a statement of whether the government seeks forfeiture under Rule 32.2 and any other law; and

(G) any other information that the court requires, including information relevant to the factors under 18 U.S.C. § 3553(a).

(3) **Exclusions.** The presentence report must exclude the following:

(A) any diagnoses that, if disclosed, might seriously disrupt a rehabilitation program;

(B) any sources of information obtained upon a promise of confidentiality; and

(C) any other information that, if disclosed, might result in physical or other harm to the defendant or others.

(e) Disclosing the Report and Recommendation.

(1) Time to Disclose. Unless the defendant has consented in writing, the probation officer must not submit a presentence report to the court or disclose its contents to anyone until the defendant has pleaded guilty or nolo contendere, or has been found guilty.

(2) Minimum Required Notice. The probation officer must give the presentence report to the defendant, the defendant's attorney, and an attorney for the government at least 35 days before sentencing unless the defendant waives this minimum period.

(3) Sentence Recommendation. By local rule or by order in a case, the court may direct the probation officer not to disclose to anyone other than the court the officer's recommendation on the sentence.

(f) Objecting to the Report.

(1) Time to Object. Within 14 days after receiving the presentence report, the parties must state in writing any objections, including objections to material information, sentencing guideline ranges, and policy statements contained in or omitted from the report.

(2) **Serving Objections.** An objecting party must provide a copy of its objections to the opposing party and to the probation officer.

(3) **Action on Objections.** After receiving objections, the probation officer may meet with the parties to discuss the objections. The probation officer may then investigate further and revise the presentence report as appropriate.

(g) Submitting the Report. At least 7 days before sentencing, the probation officer must submit to the court and to the parties the presentence report and an addendum containing any unresolved objections, the grounds for those objections, and the probation officer's comments on them.

(h) Notice of Possible Departure from Sentencing Guidelines. Before the court may depart from the applicable sentencing range on a ground not identified for departure either in the presentence report or in a party's prehearing submission, the court must give the parties reasonable notice that it is contemplating such a departure. The notice must specify any ground on which the court is contemplating a departure.

(i) Sentencing.

(1) **In General.** At sentencing, the court:

(A) must verify that the defendant and the defendant's attorney have read and discussed the presentence report and any addendum to the report;

(B) must give to the defendant and an attorney for the government a written summary of

—or summarize in camera—any information excluded from the presentence report under Rule 32(d)(3) on which the court will rely in sentencing, and give them a reasonable opportunity to comment on that information;

(C) must allow the parties' attorneys to comment on the probation officer's determinations and other matters relating to an appropriate sentence; and

(D) may, for good cause, allow a party to make a new objection at any time before sentence is imposed.

(2) Introducing Evidence; Producing a Statement. The court may permit the parties to introduce evidence on the objections. If a witness testifies at sentencing, Rule 26.2(a)–(d) and (f) applies. If a party fails to comply with a Rule 26.2 order to produce a witness's statement, the court must not consider that witness's testimony.

(3) Court Determinations. At sentencing, the court:

(A) may accept any undisputed portion of the presentence report as a finding of fact;

(B) must—for any disputed portion of the presentence report or other controverted matter —rule on the dispute or determine that a ruling is unnecessary either because the matter will not affect sentencing, or because the court will not consider the matter in sentencing; and

(C) must append a copy of the court's determinations under this rule to any copy of the presentence report made available to the Bureau of Prisons.

(4) Opportunity to Speak.

(A) By a Party. Before imposing sentence, the court must:

(i) provide the defendant's attorney an opportunity to speak on the defendant's behalf;

(ii) address the defendant personally in order to permit the defendant to speak or present any information to mitigate the sentence; and

(iii) provide an attorney for the government an opportunity to speak equivalent to that of the defendant's attorney.

(B) By a Victim. Before imposing sentence, the court must address any victim of the crime who is present at sentencing and must permit the victim to be reasonably heard.

(C) In Camera Proceedings. Upon a party's motion and for good cause, the court may hear in camera any statement made under Rule 32(i)(4).

* * * * *

3. Fed. R. Crim. P. 51 provides:

Preserving Claimed Error

(a) Exceptions Unnecessary. Exceptions to rulings or orders of the court are unnecessary.

(b) Preserving a Claim of Error. A party may preserve a claim of error by informing the court—when the court ruling or order is made or sought—of the action the party wishes the court to take, or the party's objection to the court's action and the grounds for that objection. If a party does not have an opportunity to object to a ruling or order, the absence of an objection does not later prejudice that party. A ruling or order that admits or excludes evidence is governed by Federal Rule of Evidence 103.

4. Fed. R. Crim. P. 52 provides:

Harmless and Plain Error

(a) Harmless Error. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

(b) Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

No. 16-9493

IN THE

Supreme Court of the United States

FLORENCIO ROSALES-MIRELES,
Petitioner,

v.

UNITED STATES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
ARGUMENT	2
I. THE GOVERNMENT AGREES THAT THE FIFTH CIRCUIT APPLIED THE WRONG LEGAL STANDARD	2
II. A GUIDELINES MISCALCULATION SATISFIES THE FOURTH PRONG OF PLAIN ERROR REVIEW IN THE ORDINARY CASE	5
A. Rule 52 And *Olano* Recognize That Certain Categories Of Error Ordinarily Satisfy The Fourth Prong	5
B. There Is Still Room For Discretion In Particular Cases	7
C. Agreeing With The Near-Unanimous View Of The Courts Of Appeals Will Not Wreak Havoc On Plain Error Review	9
III. THE GOVERNMENT'S NEWFOUND APPROACH WOULD EFFECTIVELY ELIMINATE PLAIN ERROR REVIEW OF GUIDELINES ERRORS, JUST LIKE THE SHOCKS-THE-CONSCIENCE STANDARD	12
CONCLUSION	15

TABLE OF AUTHORITIES

CASES

Bracy v. *Gramley*, 520 U.S. 899 (1997)..... 11
Brasfield v. *United States*, 272 U.S. 448 (1926)..... 6
Gall v. *United States*, 552 U.S. 38 (2007)..... 7, 13
Glover v. *United States*, 531 U.S. 198 (2001)..... 13
Henderson v. *United States*, 568 U.S. 266 (2013)..... 10
Hicks v. *United States*, 137 S. Ct. 2000 (2017) (Gorsuch, J., concurring)..... 7
Kimmelman v. *Morrison*, 477 U.S. 365 (1986)..... 10, 11
Koon v. *United States*, 518 U.S. 81 (1996)..... 4
Molina-Martinez v. *United States*, 136 S. Ct. 1338 (2016)..... *passim*
Puckett v. *United States*, 556 U.S. 129 (2009)..... 7
United States v. *Jenkins*, 854 F.3d 181 (2d Cir. 2017)..... 5, 6
United States v. *Olano*, 507 U.S. 725 (1993)..... 2, 9
United States v. *Tyson*, 863 F.3d 597 (7th Cir. 2017)..... 8
Williams v. *United States*, 503 U.S. 193 (1992)..... 13

COURT DOCUMENTS

Brief of Plaintiff-Appellee, *United States* v. *Fiallos*, No. 17-20423, 2017 WL 6552177 (5th Cir. Dec. 13, 2017)..... 3

TABLE OF AUTHORITIES—continued

Page

Appellee's Brief, *United States* v. *Fuentes*, No. 17-50407, 2017 WL 5759744 (5th Cir. Nov. 20, 2017) 3

Original Brief of Appellee, *United States* v. *Washington*, No. 17-30434, 2017 WL 4708216 (5th Cir. Oct. 12, 2017) 3

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Am. Bar Ass'n, *Criminal Justice Standards for the Defense Function* (4th ed.) 11

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INTRODUCTION

The government sensibly concedes (U.S. Br. 34) that the shocks-the-conscience standard that the Fifth Circuit applied is wrong. Despite the government's half-hearted protests, moreover, there can be no serious question that the Fifth Circuit rested its decision on that erroneous legal standard when it "elect[ed] not to exercise [its] discretion" because it was unable to "say that the error or resulting sentence would shock the conscience." J.A. 37. The judgment therefore cannot stand.

The government nevertheless scrambles to invent an overly stringent fourth-prong standard that *no* court of appeals has adopted and that harkens back to the purportedly abandoned shocks-the-conscience test. The government embarks on this pursuit without ever once acknowledging that the Fifth Circuit stands as a solitary outlier in its treatment of Guidelines errors under the fourth prong. In fact, the government goes so far as to cast Mr. Rosales-Mireles's arguments as "petitioner's rule" or "petitioner's proposed rule," *e.g.*, U.S. Br. 22, 26, complete with doomsday prognostications about that rule's potential effects, with absolutely no recognition that this same "rule" is currently applied across most of the country. All now agree that the Fifth Circuit's standard is wrong, and the proper inference from that concession should be that the other courts of appeals have it right.

In its attack on this majority position, the government offers a handful of meritless assertions and attacks arguments that Mr. Rosales-Mireles never made. First, the government maintains that plain Guidelines calculation errors should be corrected only in the rare and exceptional case, rather than in "most

cases." *Molina-Martinez* v. *United States*, 136 S. Ct. 1338, 1342, 1346 (2016). Make no mistake: the government's position would turn the Court's holding in *Molina-Martinez* on its head and erase that decision's recognition that Guidelines errors, by their nature, warrant relief in most cases. Second, and related, the government repeatedly mischaracterizes Mr. Rosales-Mireles as seeking a fourth-prong "presumption" for Guidelines errors. But the fact that a court of appeals "should" exercise its discretion to correct an error when the fourth-prong standard is met, *United States* v. *Olano*, 507 U.S. 725, 736 (1993), simply does not mean it must do so—presumptively or otherwise. Finally, the government regularly seeks to lump Guidelines errors together with all other possible varieties of forfeited errors to contend, for example, that defendants would have no incentive to identify and apply the correct Guidelines range in the district court. The government's worries are irreconcilable with the way most courts of appeals already approach Guidelines errors, and the Court should not assume that defense counsel would violate ethical duties to clients and to the court.

At bottom, there is absolutely no good reason that, in the ordinary case, a defendant should have to stay in jail longer due to a clerical error that everyone—the Probation Officer, the prosecutor, the judge, the defense attorney, and the defendant—all overlooked in the first instance.

ARGUMENT

I. THE GOVERNMENT AGREES THAT THE FIFTH CIRCUIT APPLIED THE WRONG LEGAL STANDARD.

The question on which this Court granted certiorari was whether, in order to satisfy *Olano*'s fourth prong,

a defendant like Mr. Rosales-Mireles is required to meet the Fifth Circuit's shocks-the-conscience test. Pet'r Br. i. The government correctly concedes that the answer to that question is "no." U.S. Br. 33–35.[1] The Fifth Circuit's judgment is therefore infirm and resentencing warranted.

In the government's view, however, the Fifth Circuit did not really apply the standard it said it was applying and, in any event, the court of appeals properly exercised its discretion. *Id.* at 33–39. These arguments both collapse upon a straightforward reading of the opinion below.

The Fifth Circuit described its view of *Olano* this way: "the types of errors that warrant reversal are ones that would shock the conscience of the common man, serve as a powerful indictment against our system of justice, or seriously call into question the competence or integrity of the district judge." J.A. 36. The court of appeals then declined to exercise its discretion because it could not say "that the error or resulting sentence would shock the conscience." *Id.* at 37. Although the government speculates that "the Fifth Circuit's description of correctable errors is [not] intended to substantively modify the existing plain-error standard," U.S. Br. 35, the undeniable import of the Fifth Circuit's actual decision is that the error's

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[1] Although the government now disavows the shock-the-conscience standard, it has not shied away from urging the Fifth Circuit to rely on that standard to deny relief, and has continued to do so even after certiorari was granted in this case. *See, e.g.*, Brief of Plaintiff-Appellee at 28, *United States* v. *Fiallos*, No. 17-20423, 2017 WL 6552177, at *28 (5th Cir. Dec. 13, 2017); Appellee's Brief at 12, 17, *United States* v. *Fuentes*, No. 17-50407, 2017 WL 5759744, at *12, *17 (5th Cir. Nov. 20, 2017); Original Brief of Appellee at 15–16, *United States* v. *Washington*, No. 17-30434, 2017 WL 4708216, at *15–16 (5th Cir. Oct. 12, 2017).

purported failure to "shock the conscience" was the basis for the judgment, J.A. 37. And that error of law means that the Fifth Circuit "by definition abuse[d] its discretion." *Koon* v. *United States*, 518 U.S. 81, 100 (1996).

Although the Court need go no further to reject the entirety of the government's request for affirmance, the government's "case-specific" arguments, U.S. Br. 36–39, fail too. First, the government spends pages repeating the particular facts of Mr. Rosales-Mireles's criminal history in an apparent effort to portray him as a bad person deserving of his sentence. *Id.* at 5–7, 36–38. But the district court was fully aware of each and every one of the background facts that the government recites here when that court, which had seen and heard from Mr. Rosales-Mireles, sentenced him to one month above the bottom of the erroneously calculated Guidelines range. That same court—not this Court or the court of appeals—should have the opportunity to decide whether a proportionate sentence near the bottom of the correct range should or should not be imposed. There is no reason to credit the government's conjecture about what the district court "could ... have" or "may have" done, *id.* at 38, under the proper Guidelines range.

Second, the government highlights the district court's statement that it "would have not sentenced Mr. Rosales[-Mireles] to anything less than the 78 months." *Id.* at 7, 37. But even the Fifth Circuit understood that this "statement, in context, does not go quite so far as saying that the court would have sentenced [Mr. Rosales-Mireles] to 78 months regardless of the guideline recommendation." J.A. 35. Nothing in the record demonstrates that the sentencing court arrived at the 78-month sentence independently of the (erroneously) calculated range. And the district

court's statement was infected by the same error that produced the incorrect range: a mistaken belief that Mr. Rosales-Mireles had one more prior conviction than he actually had.

The government's attempt to generate support for affirmance therefore only serves to demonstrate that a remand to the district court is the proper disposition of the case in its current posture. The government rests its argument upon the premise that "the *court of appeals'* decision" was "within the bounds of [*its*] discretion," but every point the government makes concerns what *the district court* did, could have done, or may have done. U.S. Br. 36–39. The court of appeals declined to remand the case because it misconstrued the legal standard, and, with that issue now cleared up, the district court should be one to decide what sentence it would impose in the first instance.

II. A GUIDELINES MISCALCULATION SATISFIES THE FOURTH PRONG OF PLAIN ERROR REVIEW IN THE ORDINARY CASE.

A. Rule 52 And *Olano* Recognize That Certain Categories Of Error Ordinarily Satisfy The Fourth Prong.

Both Rule 52 and this Court's precedent make clear that plain errors exist on a continuum: some rarely satisfy the criteria while others ordinarily do. Pet'r Br. 9–17. The nature of the error at issue is thus an important part of the fourth-prong analysis, and Guidelines errors are of a type that "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings" most of the time. As one court of appeals recently observed in a related context: "[a]dditional months in prison are not simply num-

bers. Those months have exceptionally severe consequences for the incarcerated individual. They also have consequences both for society which bears the direct and indirect costs of incarceration and for the administration of justice." *United States* v. *Jenkins*, 854 F.3d 181, 192 (2d Cir. 2017). Calculation errors unnecessarily leading to "[a]dditional months in prison," therefore, typically will "seriously affect the fairness, integrity, or public reputation of judicial proceedings."

Recognizing that the nature of the error at issue is essential to the *Olano* analysis is nothing new, and neither is recognizing the unique nature of Guidelines errors in particular. In *Molina-Martinez*, this Court found that, as a category, errors in the calculation of the Guidelines range are often "particularly serious" and therefore warrant correction "in the ordinary case." 136 S. Ct. at 1345–47. The fact that "the systemic function of the selected Guidelines range will affect the sentence" "[i]n the usual case," the Court continued, is "essential to the application of Rule 52(b) to a Guidelines error." *Id.* at 1346. That fact is just as essential to the application of Rule 52(b)'s fourth prong as it is to the third. Pet'r Br. 9–17. In short, as with other categories of errors, it is "rar[e]" that a Guideline-range error does not "bring[ ] to bear in some degree, serious, although not measurable, an improper influence upon the [sentencing court]." *Brasfield* v. *United States*, 272 U.S. 448, 450 (1926).

The government, however, accuses Mr. Rosales-Mireles of seeking an "exception" to the application of Rule 52(b) for Guidelines errors and repeats the facile refrain that all of Mr. Rosales-Mireles's arguments apply equally to any other plain error. U.S. Br. 27–31. This is simply wrong. Not all errors are as fun-

damental to the sentencing process as Guidelines calculations, nor do all errors analogously risk "allow[ing] individuals to linger longer in prison than the law requires," *Hicks* v. *United States*, 137 S. Ct. 2000, 2000–01 (2017) (Gorsuch, J., concurring), or comparably implicate probation officers acting as "arms of the court." Pet'r Br. 10–13. Not all steps in the sentencing process have the exactitude and priority of a proper Guidelines range calculation. *Gall* v. *United States*, 552 U.S. 38 (2007). Recognizing that Guidelines errors are unique in these respects does not imply any "exception" to the ordinary application of plain-error review. Rather, it simply recognizes the nature of the error for what it is and the practical consequences of that error within the established Rule 52(b) framework. See *Molina-Martinez*, 136 S. Ct. at 1346.

The government also seems to deny that the nature of the error matters at all, citing *Puckett* for the proposition that courts of appeals cannot "create exceptions to the rule or to otherwise soften its application for certain types of errors." U.S. Br. 14 (citing *Puckett* v. *United States*, 556 U.S. 129 (2009)). But that is not remotely what *Puckett* says. On the contrary, *Puckett* states that, "when the Government reneges on a plea deal, the integrity of the system may be called into question," and correction would thus ordinarily be appropriate, but goes on to note that there could always be "countervailing factors in particular cases." 556 U.S. at 142–43. And *Puckett* is not alone in considering the category of error at issue. Pet'r Br. 9–10.

B. There Is Still Room For Discretion In Particular Cases.

The courts of appeals retain discretion when facing Guidelines calculation errors under *Olano*'s fourth

prong, Pet'r Br. 17–18, and the government's responses to that point are baseless.

To begin with, the government persistently accuses Mr. Rosales-Mireles of seeking a "presumption" that Guidelines errors warrant reversal. U.S. Br. 22–27. That is false. Mr. Rosales-Mireles never argued for any "presumption" that would shift the burden of persuasion to the government on the fourth prong. As *Olano* says, the defendant retains the burden to show that the plain error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. See *Molina-Martinez*, 136 S. Ct. at 1348; see *id.* at 1351 n.4 (Alito, J. concurring) (noting that "the Court makes clear that today's decision does *not* shift the burden of persuasion from a forfeiting defendant to the Government"). Just because most Guidelines calculation errors that satisfy the first three prongs will also satisfy the fourth—because prolonging jail time in the face of a Guidelines error would seriously affect "the fairness, integrity, or public reputation of judicial proceedings" most of the time—does not create a presumption. It just reflects the empirical reality.

Next, the government similarly claims that Mr. Rosales-Mireles seeks to "collapse" the third and fourth prongs. U.S. Br. 10–11, 22. That is also false. The fourth prong remains an independent barrier to relief, and countervailing circumstances may counsel against such relief in a particular case. Pet'r Br. 17–18; see also, *e.g.*, *United States* v. *Tyson*, 863 F.3d 597, 600 (7th Cir. 2017) (denying relief for Guidelines error under fourth prong because "the court went out of his way to explain his view that the Guidelines range was too high and that the calculated recommendation was not serving as the basis for the sentence he imposed"). Although examples may not be

abundant, that merely reflects the fact that Guidelines errors ordinarily have a serious effect on the fairness, integrity, or public reputation of judicial proceedings.

Far from suggesting any problem with Mr. Rosales-Mireles's arguments, in other words, the substantial overlap between the third and fourth prongs makes perfect sense. The third prong focuses on the defendant, asking whether the plain error likely resulted in a longer sentence. *Molina-Martinez*, 136 S. Ct. at 1345. The fourth prong focuses on the judicial proceedings. *Olano*, 507 U.S. at 736. In the context of Guidelines errors, those focal points often converge, because the particular seriousness of Guidelines miscalculations affects both the defendant and the judicial proceedings as a whole. This reality reinforces Mr. Rosales-Mireles's position.

C. Agreeing With The Near-Unanimous View Of The Courts Of Appeals Will Not Wreak Havoc On Plain Error Review.

Mr. Rosales-Mireles has demonstrated that both Congress and the courts of appeals generally agree that most Guidelines errors seriously affect the fairness, integrity, or public reputation of judicial proceedings. Pet'r Br. 17–18. The government's brief misconstrues the point about Congress and ignores the near-unanimous view of the courts of appeals—all while proffering a series of hollow concerns about the future of plain error review.

As for Congress, Mr. Rosales-Mireles cited 18 U.S.C. § 3742(f)(1) because it reflects a congressional judgment about the seriousness of Guidelines errors. *Id.* at 16. The government confusingly maintains that the statutory provision "would not affect the application of the plain-error standard," U.S. Br. 31, but Mr.

Rosales-Mireles never argued it should. The statute is just one more indication, this time from the legislative body that established the Guidelines regime, that Guidelines errors "can be particularly serious." *Molina-Martinez*, 136 S. Ct. at 1345.

Even more fundamentally, the government's 40-page brief nowhere acknowledges that Mr. Rosales-Mireles has advanced the argument that almost all courts of appeals *already accept*. That alone eliminates the government's alleged concerns over a ruling for Mr. Rosales-Mireles. Indeed, the government expressed exactly the same "concern[s]" about the possible ramifications in *Molina-Martinez*, and this Court was not persuaded because, among other things, the "holding [wa]s consistent with the approach taken by most Courts of Appeals." *Id.* at 1348. The same is true here.

The government nevertheless frets that defendants would have reduced incentives to object contemporaneously to Guidelines errors and might try to "sandbag" district courts. U.S. Br. 17–18, 27. That is preposterous. Because the Guidelines range is the starting point for all sentencing decisions, no rational defendant would seek anything but the lowest range possible. There is absolutely no strategic benefit to allowing a sentencing court to base its sentence on an erroneously high range and then hoping for a correction and a lower sentence on remand. As this Court recently said, "[i]f there is a lawyer who would deliberately forgo objection now because he perceives some slightly expanded chance to argue for 'plain error' later, we suspect that, like the unicorn, he finds his home in the imagination, not the courtroom." *Henderson* v. *United States*, 568 U.S. 266, 276 (2013) (emphasis omitted); see also *Kimmelman* v. *Morrison*, 477 U.S. 365, 382 n.7 (1986) (finding it "virtually in-

conceivable that an attorney would deliberately invite the judgment that his performance was constitutionally deficient").

The government's argument also flies in the face of the reality that defense counsel, like prosecutors, are officers of the court and are bound by a code of ethics. See Am. Bar Ass'n, *Criminal Justice Standards for the Defense Function*, Standard 4-1.2, 4-1.4 (4th ed.). Because this Court does not decide cases on the basis that any of the actors in the process might deliberately cheat, see *Bracy* v. *Gramley*, 520 U.S. 899, 909 (1997) ("[o]rdinarily, we presume that public officials have properly discharged their official duties"), the government's implied concern about bad faith warrants not only rejection but disapprobation.

In addition, the government notes that, should resentencing occur, the "passage of time may provide the defendant with additional arguments." U.S. Br. 27 (citing *Pepper* v. *United States*, 562 U.S. 476 (2011)). Even setting aside the difficulty in seeing why that would be a bad thing, the possibility of new information arising after sentencing cuts both ways: it could lead to a lower *or* higher sentence, depending on what happens. *Pepper* is not just a defendant-friendly ratchet.

Finally, the government labels as "wrong" Mr. Rosales-Mireles's observation that remand for resentencing is a relatively "simple task." *Id.* at 32–33. But this Court heard and rejected the same exaggerated concerns in *Molina-Martinez*. To repeat: "a remand for resentencing, while not costless, does not invoke the same difficulties as a remand for retrial does." *Molina-Martinez*, 136 S. Ct. 1348–49. It is thus "doubtful that [ruling in Mr. Rosales-Mireles' favor] will result in much of an increased burden" because it would be "consistent with the approach taken by

most Courts of Appeals," and "[y]et only a small fraction of cases are remanded for resentencing because of Guidelines related errors." *Id.* at 1348.

That is equally true today, and it guts the government's claims about practical implications and about the proper disposition of this case more broadly. In fiscal year 2016, there were 310 successful sentencing appeals—under both harmless and plain-error review—that raised issues pertaining to Guidelines calculations. U.S. Sentencing Comm'n, *Sourcebook of Federal Sentencing Statistics*, tbl. 59 (2016). That comes from a universe of 5,222 appeals challenging a sentence. *Id.* tbl. 55. Given that "most" courts of appeals already deploy the approach Mr. Rosales-Mireles advances, a success rate of less than 6% hardly suggests that there should be any cause for concern about an "increased burden" and suggests, instead, that defendants' overall success in this area is actually quite rare.

III. THE GOVERNMENT'S NEWFOUND APPROACH WOULD EFFECTIVELY ELIMINATE PLAIN ERROR REVIEW OF GUIDELINES ERRORS, JUST LIKE THE SHOCKS-THE-CONSCIENCE STANDARD.

Despite never acknowledging the near-unanimous view of the courts of appeals, the government asks this Court to adopt a three-part test that no court of appeals has ever adopted. That "test" amounts to nothing more than a rebranding of the difficult-to-meet shocks-the-conscience standard disguised behind multiple "factors." The Court should reject it.

The government proposes that a court of appeals should seek to determine "whether the error impugns the sentencing process as a whole." U.S. Br. 20. To do so, the government maintains, the court of appeals

should consider three factors: (1) "whether the sentence reflects a reasonable application of the district court's sentencing discretion notwithstanding the error[,]" (2) the "magnitude of the Guidelines error in light of the sentencing as a whole[,]" and (3) "whether the defendant was afforded procedural protections necessary to ensure the fairness and integrity of the sentencing proceeding." *Id.* at 20–21. That three-factor test finds no support in this Court's precedent and for good reason.

First, the proposed focus on "reasonableness" inverts the inquiry from *Gall* and collides with *Williams*. Under *Gall*, a court of appeals must "first ensure that the district court committed no significant procedural error, such as ... improperly calculating[ ] the Guidelines range," before considering "the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard." 552 U.S. at 51. The government offers no support for reversing that inquiry when the "significant procedural error" of a Guidelines miscalculation arises in the context of plain-error review. Nor could it, because, as *Williams* v. *United States* held, "it is the prerogative of the district court, not the court of appeals, to determine, in the first instance, the sentence that should be imposed in light of certain factors properly considered under the Guidelines." 503 U.S. 193, 205 (1992). When a district court incorrectly calculates the Guidelines range, it has not properly exercised its sentencing discretion, and the court of appeals should not be permitted to subvert such an error based on the court of appeals' own assessment of the "reasonableness" of the sentence imposed.

Second, the government's proposal to consider the "magnitude" of the error runs counter to this Court's decision in *Glover* v. *United States*, 531 U.S. 198

(2001). That case expressly counsels against using the duration of "extra" imprisonment as a proxy for significance and resulting prejudice. *Id.* at 203–04.

Third, asking "whether the defendant was afforded procedural protections necessary to ensure the fairness and integrity of the sentencing proceeding" is a make-weight. If the procedures were not fair, that would provide an independent basis for attacking the sentence. This Court has never conditioned satisfaction of the fourth prong for one error on the presence of other errors.

In sum, the government's proposal to reinstitute an overly strict standard, like the now-abandoned shocks-the-conscience standard, fails. The standard announced in *Olano* continues to govern, and there is absolutely nothing improper in recognizing, as most courts of appeals already do, that Guidelines calculation errors meet that standard in most cases.

CONCLUSION

For the foregoing reasons, as well as those stated in Mr. Rosales-Mireles' opening brief, the Court should reverse the judgment below and remand to the Fifth Circuit with instructions to vacate the sentence and remand to the district court for resentencing.

Respectfully submitted,

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No. 16-9493

In The Supreme Court of the United States

FLORENCIO ROSALES-MIRELES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF AMICI CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, FAMILIES AGAINST MANDATORY MINIMUMS, AND NATIONAL ASSOCIATION OF FEDERAL DEFENDERS IN SUPPORT OF PETITIONER AND URGING REVERSAL

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QUESTION PRESENTED

To meet the standard for plain error review, is it necessary, as the United States Court of Appeals for the Fifth Circuit held, that the error be one that would "shock the conscience of the common man, serve as a powerful indictment against our system of justice, or seriously call into question the competence or integrity of the district judge"?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF AMICI CURIAE 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT 4

I. THE FIFTH CIRCUIT'S HOLDING CANNOT BE RECONCILED WITH THIS COURT'S DECISIONS 4

II. REAL WORLD EXPERIENCE SHOWS THE IMPORTANCE OF A CORRECT GUIDELINES DETERMINATION 8

CONCLUSION 16

TABLE OF AUTHORITIES

CASES

Gall v. United States,
552 U.S. 38 (2007) 3, 5, 6

Glover v. United States,
531 U.S. 198 (2001) 3, 7

Molina-Martinez v. United States,
136 S. Ct. 1338 (2016) 3, 5, 6

Strickland v. Washington,
466 U.S. 668 (1984) 7, 8

United States v. Olano,
507 U.S. 725 (1993) 3, 4, 6, 8

STATUTES, GUIDELINES, AND RULES

18 U.S.C. § 3553(a) 7

Fed. R. Crim. P. 52(b) 3, 4

U.S.S.G. § 3D1.2 7

U.S.S.G. Appx. C, amend. 788 (Nov. 1, 2016). 9

Sup. Ct. R. 37.6 1

OTHER AUTHORITIES

Sarah N. Lynch, *Trump Administration Reduces Support for Prisoner Halfway Houses*, Reuters, Oct. 13, 2017 6

INTEREST OF AMICI CURIAE[1]

Amicus National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct.

NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges committed to preserving fairness and promoting a rational and humane criminal justice system.

NACDL files numerous amicus briefs each year in the Supreme Court and other courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. NACDL knows that criminal defense attorneys sometimes make mistakes as they undertake their difficult but important duties. NACDL and its members strongly believe that the plain error rule, as interpreted by this Court, suffices to protect the appellate process, and that any more

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[1] Under S.Ct. R. 37.6, counsel for amici curiae state that no counsel for a party authored this brief in whole or in part, and that no person other than amici, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. Amici have obtained letters of consent to the filing of this brief from all parties.

stringent rule would tilt the system too far against fairness and justice for defendants.

Amicus Families Against Mandatory Minimums (FAMM) is a national, nonprofit, nonpartisan organization dedicated to promoting fair and proportionate sentencing policies and challenging inflexible and excessive penalties. FAMM's vision is a nation with a criminal justice system in which sentencing is individualized and humane, imposing penalties that are no greater than necessary to ensure just punishment, secure public safety, and support successful rehabilitation. Since its founding in 1991, FAMM has accomplished its purposes through public education, selected amicus filings in important cases, congressional efforts, and advocacy before the United States Sentencing Commission. FAMM's membership includes more than 30,000 federal prisoners with whom we routinely correspond, along with their loved ones on the outside. The majority of these prisoners are serving sentences imposed under the federal Sentencing Guidelines.

FAMM joins this brief on behalf of our members because we believe an error that results – or presents a reasonable likelihood of having resulted – in *any* additional prison time, for whatever reason, "seriously affects the fairness, integrity, or public reputation" of the sentencing proceeding.

Amicus National Association of Federal Defenders (NAFD), formed in 1995, is a nationwide, nonprofit, volunteer organization whose membership is composed of attorneys who work for federal public and community defender organizations authorized

under the Criminal Justice Act. Each year, federal defenders represent tens of thousands of individuals in federal court. Federal defenders often argue for the kinds of sentence differentials at issue in this case. They also frequently confront plain error review on appeal. Amicus NAFD therefore has both particular expertise and interest in the subject matter of this litigation.

SUMMARY OF THE ARGUMENT

1. The Fifth Circuit's "shock the conscience of the common man" standard for the fourth prong of the plain error standard cannot be reconciled with this Court's decisions. That standard – which the Fifth Circuit alone has adopted – finds no support in the language or rationale of *United States v. Olano*, 507 U.S. 725 (1993), and Fed. R. Crim. P. 52(b). Moreover, as applied here to render many errors in calculating the Guidelines sentencing range immune from effective plain error review, the Fifth Circuit's standard contravenes this Court's decisions in *Molina-Martinez v. United States*, 578 U.S. —, 136 S. Ct. 1338 (2016), and *Glover v. United States*, 531 U.S. 198 (2001). The Fifth Circuit's standard also improperly shifts the appellate court's focus from the impact of what this Court has called "significant procedural error," *Gall v. United States*, 552 U.S. 38, 51 (2007), to something akin to "substantive unreasonableness." *Id.* Those decisions make clear that *any* error which produces a longer prison sentence has constitutional significance, affects the public reputation of the courts, and warrants correction.

2. Because of the Guidelines' technical nature, it is easy to lose sight of the human consequences of a Guidelines error. Even a seemingly minor error that produces only a few months of additional incarceration can have a profound impact on a prisoner's family ties, medical treatment, and overall reintegration into society. Amici offer the stories of three defendants – Judy McCarroll, Mickey Randle, and Eric Galanti – to illustrate this point.

ARGUMENT

I. THE FIFTH CIRCUIT'S HOLDING CANNOT BE RECONCILED WITH THIS COURT'S DECISIONS.

The law is clear: the Fifth Circuit's refusal to reverse a sentence for plain error unless the result would "shock the conscience of the common man, serve as a powerful indictment against our system of justice, or seriously call into question the competence or integrity of the district judge" conflicts squarely with this Court's decisions.

The Court held in *United States v. Olano*, 507 U.S. 725 (1993), that a court of appeals "should correct a plain forfeited error affecting substantial rights if the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.* at 736. Nothing in that language – or in the language of Fed. R. Crim. P. 52(b), on which *Olano* rests – supports the Fifth Circuit's more stringent "shock the conscience of the common man" standard.

Two decisions from this Court highlight the court of appeals' error. In *Molina-Martinez v. United States*, 578 U.S. —, 136 S. Ct. 1338 (2016), the Court rejected a similar effort by the Fifth Circuit to make the *Olano* plain error standard more onerous. In *Molina-Martinez*, the district court determined the Guidelines range incorrectly, but its sentence fell within the correct range. The court of appeals held that to show that the Guidelines error had affected the defendant's "substantial rights" – the third *Olano* prong – the defendant had to present "additional evidence," beyond the Guidelines error, that the district court would likely have imposed a lesser sentence absent the error.

This Court rejected the Fifth Circuit's gloss on *Olano*. It emphasized the "central role" of the Guidelines in the federal sentencing regime, in which the Guidelines serve as a "'starting point and . . . initial benchmark.'" *Id.* at 1346 (quoting *Gall v. United States*, 552 U.S. 38, 49 (2007)). The Court concluded that "[f]rom the centrality of the Guidelines in the sentencing process it must follow that, when a defendant shows that the district court used an incorrect range, he should not be barred from relief on appeal simply because there is no other evidence that the sentencing outcome would have been different had the correct range been used." *Id.*

Having failed in its effort to increase the defendant-appellant's plain error burden under *Olano*'s *third* (prejudice) prong, the Fifth Circuit seeks to accomplish the same result by its "shock the conscience of the common man" gloss on *Olano*'s *fourth* (discretion) prong. But that standard, like the

"additional evidence" requirement in *Molina-Martinez*, lacks any basis in *Olano* and Rule 52(b). Moreover, in the sentencing context the "shock the conscience" standard overlooks the central role that the Guidelines play in determining a federal sentence. Even an erroneous one-level increase in the Guidelines range can produce an increase of months or years in a defendant's prison term. The same is true of a one-category error in criminal history scoring, as occurred in petitioner's case. Such an increase "seriously affects the fairness, integrity, or public reputation of judicial proceedings," *Olano*, 507 U.S. at 736, regardless of whether it also would "shock the conscience of the common man, serve as a powerful indictment against our system of justice, or seriously call into question the competence or integrity of the district judge."

The idiosyncratic standard invented and applied by the court below also appears to confuse appellate review of a sentence for *procedural* regularity (in which the correctness of the Guidelines calculation is included; *see Gall*, 552 U.S. at 51), with a sort of heightened standard of *substantive* reasonableness. Whether the length or other severity of the sentence would "shock the conscience of the common man" reflects (in an exaggerated way) the latter form of review, which is entirely separate from the former. To obtain appellate reversal on account of "significant procedural error," *id.* – as here, where petitioner's criminal history category was miscalculated due to a careless error by a U.S. Probation Officer that went uncorrected by defense counsel, by the government, or by the court – there is no requirement that the defendant *also* show that the sentence imposed was

substantively unreasonable, that is, plainly excessive.[2] The test invented by the Fifth Circuit thus examines the "plainness" of the wrong error (the ultimate severity of the sentence, rather than the miscalculation of petitioner's prior record).

A court is required to review for plain error the claim on which a defendant predicates his appeal. The criminal history error in this case affects the procedural, not the substantive, reasonableness of the sentence. The reputation of the courts would be adversely affected by a public perception that appellate judges are not concerned when it is pointed out that no participant in the process managed to avoid simple mistakes in determining the defendant's prior record.

This Court's decision in *Glover v. United States*, 531 U.S. 198 (2001), underscores that even a small error in the Guidelines determination must be deemed worthy of correction. In *Glover*, the defendant's counsel performed deficiently in failing to argue for grouping of counts under U.S.S.G. § 3D1.2. The resulting Guidelines error produced a sentence 6 to 21 months longer than it should have been. The court of appeals held that the slightly longer sentence did not suffice to establish prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984). In reversing, this Court declared that "*any* amount of actual jail time has Sixth Amendment significance." 531 U.S. at 203

[2] Proper appellate review for substantive unreasonableness asks whether the district court abused its discretion in concluding that the sentence it selected is "sufficient, but not greater than necessary," 18 U.S.C. § 3553(a), to achieve the purposes of punishment.

(emphasis added). Just as "any amount of actual jail time" constitutes prejudice under *Strickland*, so any reasonable probability of additional jail time resulting from Guidelines error "seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Olano*, 507 U.S. at 736. In petitioner's case, the court imposed a low-end sentence of 78 months, a mere month above the floor of the erroneously calculated range of 77 to 96 months. The Fifth Circuit's decision meant that the district court was not permitted to reconsider the punishment, including whether to resentence petitioner to the low end of the now properly calculated range of 70 to 87 months.

The increase in petitioner's Guidelines range resulted, in this case, from the failure of anyone involved to notice that the same prior conviction was being counted twice. That sort of unconcern for "getting it right" surely goes to the integrity of the process as well as its fairness. It would seriously affect the public reputation of judicial proceedings in the mind of any informed and neutral observer. Applying a correct interpretation of the plain error rule, petitioner's judgment of sentence should have been vacated and remanded for resentencing.

II. REAL WORLD EXPERIENCE SHOWS THE IMPORTANCE OF A CORRECT GUIDELINES DETERMINATION.

Because Guidelines calculations often involve technical determinations cloaked in legal jargon, it is easy to lose sight of the human consequences of an erroneous calculation that produces an extended

prison sentence. Amicus FAMM, which regularly corresponds with thousands of federal prisoners and members of their families, has collected the following accounts of real people convicted of federal crimes and sent to prison whose sentences were either extended or reduced by relatively short periods. Theirs are but a few of the many stories FAMM has collected and are representative of experiences shared by clients of NACDL and NAFD members. These accounts illustrate the profound impact that even a few additional months of incarceration can have on a prisoner and the prisoner's family.

Judy McCarroll:

On July 23, 1996, Ms. McCarroll was sentenced to 328 months on a series of counts relating to her involvement in a heroin trafficking operation.[3] On May 12, 2015, following the United States Sentencing Commission's 2014 decision to make a guideline reduction retroactive,[4] the district court reduced Ms. McCarroll's sentence to 235 months, which entitled her to release within months.[5] The next day, May 13, Ms. McCarroll learned she had breast cancer.[6]

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[3] *United States v. Judy McCarroll*, No. 95cr48, Sentencing Order (N.D. Ill., July 23, 1996).

[4] *See* U.S.S.G. Appx. C, amend. 788 (effective Nov. 1, 2014).

[5] *United States v. Judy McCarroll*, No. 95cr48, Order Regarding Motion for Sentence Reduction Pursuant to 18 U.S.C. § 3582(c)(2) (N.D. Ill., May 12, 2015).

[6] Kenosha News, Deneen Smith, "Out of Prison, Into a Tough Spot," (Apr. 19, 2016) (Kenosha News), *available at* http://www.kenoshanews.com/news/out-of-prison-into-a-tough-spot/article_93fc91fb-f97e-557d-b722-b239532e7a2c.html.

Ms. McCarroll, who originally had not been slated for release until 2019, left prison on October 30, 2015,[7] having served more than 20 years. She immediately began aggressive treatment for breast cancer.[8] Her cancer is now in remission.

Ms. McCarroll summed up her prison experience this way: "I've lost so much when I was locked up that I can never get back."[9] While she was incarcerated her father, her mother, and a brother passed away.[10] Children and grandchildren grew up.

When Ms. McCarroll left prison, she was welcomed home, weak and penniless, by her grandson, who was five when she went away and who opened his home to her on her return.[11] Her early release means not only that she can control her own health-care decisions and receive more than minimally adequate treatment, but also that she has been present for the important events that mark new beginnings and the passage of time, such as birthday celebrations and holidays. In September 2016, she was home for the birth of two great-grandchildren, Da'karri and Caleb and in May 2017, she attended her daughter's wedding.[12] Had the sentence reduction not

[7] Bureau of Prisons, Inmate Locator, Judy McCarroll, No. 08864-424, *available at* https://www.bop.gov/inmateloc/.

[8] Kenosha News, *supra* note 5.

[9] *Id.*

[10] Email from Judy McCarroll to Debi Campbell, Communications and Outreach Associate, FAMM (Nov. 27, 2017, 06:32 PM EST) (on file with FAMM).

[11] Kenosha News, *supra* note 5.

[12] Email from Judy McCarroll to Debi Campbell (Nov. 28, 2017, 12:47 PM EST) (on file with FAMM).

been granted, Ms. McCarroll would have been receiving suboptimal cancer treatment in prison, might not yet have held her great-grandchildren, and would have missed her daughter's wedding.

Mickey Randle:

Just as Judy McCarroll's case illustrates the impact of a sentence reduction, so the case of Mickey A. Randle shows the effect of a short extension of the period of incarceration. Mr. Randle is serving a sentence of 188 months, reduced from a longer term as a result of three separate sentence adjustments based on retroactive Guidelines amendments, with an expiration date (after deductions for good time) of March 23, 2019.[13] On November 8, 2017, he learned that he would likely be released from prison by June 2018 following recommendations for 270 days (nine months) halfway house time by his case manager.[14] He understood that the transfer date had been approved by the Chicago-based Residential Reentry Management office overseeing his halfway house.[15]

While he was incarcerated, much changed for Mr. Randle back home. Mr. Randle missed high school

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[13] Order Correcting Clerical Error re: Motion for Modification of Sentence Following a Change in the Sentencing Guidelines, (Apr. 20, 2015); Order Granting in Part Motion for Modification of Sentence Following a Change in the Sentencing Guidelines (Nov. 22, 2011); Order Granting Motion for Modification of Sentence Following a Change in the Sentencing Guidelines (Apr. 29, 2008).

[14] Corrlinks message from Mickey A. Randle to Ann Espuelas, Storyteller and Research Manager, FAMM (Nov. 29, 2017, 09:38 PM EST) (on file with FAMM).

[15] *Id.*

graduations for all but one of his children, and his eldest daughter's wedding.[16] His wife of 27 years, Grace, who stood with him for many of his prison years, passed away in January 2014.[17]

Two years ago, Mr. Randle married his current wife, Myli.[18] Now he is preparing to return home, and she and their blended family are anxious to welcome him. He was confident, despite the news that a number of halfway houses were closing, because the center in his home area was to remain open.[19] Release as planned meant he would be able to attend his son's high school graduation in June.[20] His youngest daughter, who was nine years old when he went to prison,[21] had planned a September wedding and looked forward to walking down the aisle with her father.[22]

But Mr. Randle will not be present for his son's graduation. He learned in mid-November that his halfway house release date will be delayed, for

[16] Corrlinks message from Mickey A. Randle to Ann Espuelas (Nov. 29, 2017, 11:19 PM EST) (on file with FAMM).

[17] Corrlinks message from Mickey A. Randle to Ann Espuelas, (Nov. 30, 2017, 05:29 PM EST) (on file with FAMM).

[18] Email from Myli Thomas to Ann Espuelas (Nov. 29, 2017, 12:12 PM EST) (on file with FAMM).

[19] Corrlinks message from Mickey A. Randle to Ann Espuelas (Nov. 30, 2017, 04:06 PM EST) (on file with FAMM).

[20] Corrlinks message from Mickey A. Randle to Ann Espuelas (Nov. 28, 2017, 09:38 PM EST) (on file with FAMM).

[21] Email from Myli Thomas to Ann Espuelas, Storyteller and Research Director, FAMM (Nov. 29, 2017, 12:12 PM EST) (on file with FAMM).

[22] Email from Myli Thomas to Ann Espuelas (Dec. 4, 2017, 02:17 PM EST) (on file with FAMM).

ostensible Bureau of Prisons budgetary reasons, to November 21, 2018.[23] The delay is likely because the Administration has severed contracts with a number of halfway house facilities in a putative cost-saving measure.[24] His daughter has had to postpone her September wedding to April 2019 so that her father can be there.[25] The impact of this five-month delay in release is tangible and painful.

Mr. Randle writes simply, "My children [have] been disappointed numerous times already, thinking that I would have been home much sooner . . . [T]hat's not only taking a toll on me, but it's taking a toll on them too."[26]

Eric Galanti:

Eric Galanti's story further illustrates how a short period of incarceration can cause significant disruption to the lives of prisoners and their loved ones. He was sentenced on April 14, 2017 to serve eight months' imprisonment for failing to file corporate tax returns.[27] On November 14, he was

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[23] Corrlinks message from Mickey A. Randle to Ann Espuelas (Nov. 29, 2017, 09:38 PM) (on file with FAMM).

[24] *See* Sarah N. Lynch, *Trump Administration Reduces Support for Prisoner Halfway Houses*, Reuters, Oct. 13, 2017, *available at* https://www.reuters.com/article/us-usa-justice-prisons-exclusive/exclusive-trump-administration-reduces-support-for-prisoner-halfway-houses-idUSKBN1CI2ZA.

[25] Email from Mylie Thomas to Ann Espuelas (Dec. 4, 2017, 02:17 PM EST) (on file with FAMM).

[26] Corrlinks message from Mickey A. Randle to Ann Espuelas (Nov. 24, 2017 09:38 PM EST) (on file with FAMM).

[27] Judgment, *United States v. Galanti*, No. 16cr64 (Apr. 14, 2017, W.D. Wa.).

informed by Bureau of Prisons staff that he would be released on January 8, 2018 to spend the final three weeks of his sentence at home.[28] He signed paperwork two days later which included instructions on how to transition to home confinement.[29]

Mr. Galanti suffers from a painful medical condition known as Crohn's disease; in prison, he receives only Prednisone for it, which does little to alleviate his pain.[30] Once he learned of his release to home confinement, he planned to begin the recommended treatment regimen for this condition on January 22.[31] His family also relied on his January 8 return. As soon as they learned of his release date, his father's surgeon scheduled open heart surgery for January 10 so that Mr. Galanti could help his mother care for his father on his release from the hospital.[32]

Unfortunately, Mr. Galanti will not go home in early January. Instead, he learned on November 17 that he would not be released to home confinement at all. Prison staff explained that due to budget cuts, he will stay in prison to serve his entire sentence.[33] He will be released on January 30, 2018.[34] He has been

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[28] Email from Debra Galanti to Ann Espuelas (Dec. 4, 2017, 07:54 PM EST) (on file with FAMM).

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] Federal Bureau of Prisons, Inmate Locator, Eric M. Galanti, No. 47699-086, available at

forced to postpone his own healthcare to late February, and he will be unable to assist his father's recovery.[35] His mother writes: "I will now have to take care of my husband by myself which I will do, but Eric has to suffer with the horrible pain associated with Crohn's for a much longer time now . . . . Our family has been greatly affected by the cutback of halfway houses."[36] Just a three week difference in the period of imprisonment has had a potent impact on Mr. Galanti and his family.

* * * *

These and countless other real-world examples bring home the fundamental point the Fifth Circuit overlooks: No erroneous judicial decision that produces additional prison time – even an amount of time that may, in the abstract, strike a judge as relatively trivial – can be considered acceptable. Any such error "seriously affects the fairness, integrity, or public reputation of judicial proceedings," *Olano*, 507 U.S. at 736, regardless of whether it would also meet the Fifth Circuit's legally baseless "shock the conscience of the common man" standard.

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https://www.bop.gov/mobile/find_inmate/byname.jsp#inmate_results.

[35] Email from Debra Galanti to Ann Espuelas (Dec. 4, 2017, 07:54 PM EST) (on file with FAMM).

[36] *Id.*

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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